Supreme Court of the United States

OCTOBER TERM, 1970

No. 324

PRESTON A. TATE,

Petitioner,

—v.—

HERMAN SHORT, Chief of Police, Houston, Texas,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

INDEX

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 42,209 styled:

EX PARTE PRESTON A. TATE, APPELLANT

vs.

HERMAN SHORT, Chief of Police of the City of Houston Texas, APPELLEE

judgment of the County Criminal Court at Law No. 1 of Harris County, Texas, was affirmed on July 16, 1969. Appellant's Motion for Rehearing was overruled, without written opinion, October 22, 1969, and on October 24, 1969 mandate issued.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on October 22, 1969, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas, this the 9th day of March, A.D. 1970.

/s/ Glenn Haynes
GLENN HAYNES, Clerk of the Court
of Criminal Appeals of Texas

[SEAL]

TRIAL COURT NO. 245832

THE STATE OF TEXAS,

To the County Criminal Court at law No. 1 of Harris County—Greeting:

Before our Court of Criminal Appeals, on the 22nd day of October A.D. 1969, the cause upon appeal to revise or reverse your Judgment between

EX PARTE PRESTON A. TATE, APPELLANT

No. 42,209 *vs.*

THE STATE OF TEXAS, APPELLEE

was determined; and therein our said Court of Criminal Appeals made its order in these words:

Petitioner is an inmate of the prison farm of the City of Houston by virtue of a capias growing out of six traffic court convictions with aggregate fines of $425.00.

We overrule appellant's contention that because he is too poor to pay the fines his imprisonment is unconstitutional. His status as an indigent does not render this petitioner immune from criminal prosecution.

The relief prayed for is denied.

Appellant's motion for rehearing overruled without written opinion.

WHEREFORE, We command you to observe the order of our said Court of Criminal Appeals in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. K. K. WOODLEY, Presiding Judge of our said Court of Criminal Appeals, with the Seal thereof annexed, at the City of Austin, this 24th day of October A.D. 1969

GLENN HAYNES
Clerk.

/s/ [Illegible]
Deputy Clerk

[SEAL]

[Filed, Oct 27 1969 Ray Hardy, District Clerk Harris County, Texas By [Illegible] Deputy]

STATE OF TEXAS

COUNTY OF HARRIS

I, Ray Hardy, District Clerk of Harris County, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, filed on: Oct. 27, 1969, as appears of record in my office.

Witness my official hand and seal of office, this March 10, 1970.

RAY HARDY, District Clerk
Harris County, Texas

By /s/ S. Daniel, Deputy

Reh. 10-15-69

No. 42,209

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

AUSTIN, TEXAS

EX PARTE: PRESTON A. TATE

MOTION FOR REHEARING

PETER S. NAVARRO, JR.
Attorney for Appellant
6731 Harrisburg Boulevard
Houston, Texas 77011
928-3943

[Filed in Court of Criminal Appeals Jul 31 1969
Glenn Haynes, Clerk]

No. 42,209

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

AUSTIN, TEXAS

EX PARTE: PRESTON A. TATE

MOTION FOR REHEARING

TO THE HONORABLE COURT:

Comes now PRESTON A. TATE, Appellant, and moves for a Rehearing in this cause, asserting as grounds therefore, the following:

1.) Since it is undisputed that the Appellant is indigent, the trial Court should have imposed specific conditions of probation requiring "reasonable" fines to be paid in installments rather than give him no alternative but to serve a sentence in jail or the prison farm.

2.) Though Appellant's status as an indigent does not render him immune from criminal prosecution, his inability to pay the aggregate fines of $425.00, thus causing him to be jailed, presents Appellant's contention that such a sentence establishes a dual standard of punishment, i.e., a fine for non-indigents and imprisonment for indigents, in contravention of the Constitution of the United States, and the State of Texas.

WHEREFORE, Appellant prays that this Honorable Court grant this Motion For Rehearing and discharge the Appellant from custody.

Respectfully submitted,

/s/ Peter S. Navarro, Jr.
PERER S. NAVARRO, JR.
Attorney for Appellant
6731 Harrisburg Blvd.
Houston, Texas 77011
928-3943

CERTIFICATION

I certify that a true copy of the Motion For Rehearing was mailed by United States Certified Mail, postage prepaid, to Honorable Carol S. Vance, District Attorney, Criminal Courts Building, Houston, Texas, 77002, Attorney for the State, on the 29th day of July, 1969.

/s/ Peter S. Navarro, Jr.
PERER S. NAVARRO, JR.
Attorney for Appellant
6731 Harrisburg Blvd.
Houston, Texas 77011
928-3943

A True Copy
Attest: Glenn Haynes, Clerk
Court of Criminal Appeals of Texas
By: /s/ Troy Bennett
Deputy
[SEAL]

EX PARTE: PRESTON A. TATE

No. 42,209—Appeal from Harris County

OPINION

Petitioner is an inmate of the prison farm of the City of Houston by virtue of a capias growing out of six traffic court convictions with aggregate fines of $425.00.

We overrule appellant's contention that because he is too poor to pay the fines his imprisonment is unconstitutional. His status as an indigent does not render this petitioner immune from criminal prosecution.

The relief prayed for is denied.

MORRISON, Judge

(Delivered July 16, 1969)

No. 42,209

EX PARTE: PRESTON A. TATE, APPELLANT

vs.

THE STATE OF TEXAS, APPELLEE

APPEAL FROM HARRIS COUNTY

RELIEF DENIED

OPINION BY
MORRISON, Judge

[Filed in Court of Criminal Appeals, Jul 16 1969
Glenn Haynes, Clerk]

A True Copy

Attest: Glenn Haynes, Clerk
Court of Criminal Appeals of Texas

By: /s/ Troy Bennett
Deputy

[SEAL]

No. 42,209

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

EX PARTE: PRESTON A. TATE

SUMMATION OF RELATOR

PETER S. NAVARRO, JR.
6731 Harrisburg
Houston, Texas 77011
Attorney for Relator

Of Counsel:

BROCK SHAMBERG
1402 Prospect, # 1
Houston, Texas 77004

[Filed in Court of Criminal Appeals, Jun 25 1969
Glenn Haynes, Clerk]

HABEAS CORPUS, TO THE COURT OF CRIMINAL APPEAL, BY APPEAL FROM THE COUNTY CRIMINAL COURT AT # 1 OF HARRIS COUNTY, TEXAS

SHORT STATEMENT OF THE CASE

On the 7th August, 1968, the Relator, and his wife had reason to call the Houston City Police Department about a domestic matter (s/f p. 20). When the officers arrived at Relator's residence they first had a conversation with him, after which, the Relator was taken down to the police station. (s/f pp. 13-14)

The Relator's testimony reflects that he was eventually detained, the same day, at the City jail as a result of

some outstanding unpaid "traffic-tickets". (s/f pp. 14-16).

Relator appeared in the Corporation Court of the City of Houston on six different occasions, entering pleas of "not guilty" five times, and the plea of "nolo contendere" the sixth and last time. It was on this latter plea that the Court entered judgments on a series of alleged delinquent traffic-violations fining your Relator the total sum of Four hundred twenty-five dollars ($425.00). (s/f pp. 20-22.)

At no time during his appearance before the Corporation Judge, was Relator appraised of his right to the advice of counsel, though he was told if he couldn't produce ". . . the attorney or the money . . ." he, . . . "would be in jail . . ." (s/f p. 23).

After filing an affidavit that he was too poor to pay the fines assessed, the Relator was released on a Habeas Corpus bond on August 28, 1968. He served twenty-one days at the City of Houston Prison Farm. He has received credit for one hundred five dollars ($105.00), or credit against the fine at five dollars ($5.00) for each day or fraction of a day he has served, and could be released from custody, absent Habeas Corpus, if he were able to pay the uncredited sum of three hundred twenty dollars ($320.00), which he cannot do because he hasn't the money. (s/f pp. 25-28).

The Court below denied the Writ of Habeas Corpus rather than dismiss it, permitting this Appeal to be heard, and to be determined before this Honorable Court, upon the law and the facts arising upon record. The Relator would exhaust his remedies here.

POSTURE OF RELATOR

Fully aware that the design of this appeal is to do substantial justice, your Relator is most prone to develop, as they concern him, the two stark factual realities arising from the record.

On the one hand, and at all times material, the Relator is and was an indigent, or to use the language of the State's attorney in stipulation, ". . . he is poverty

striken, and (that) his wholly family has been for all periods of time therein, and probably always will be . . ." (s/f p. 28). Short of some miracle, there is no conceivable way or manner in which the Relator can pay the sum of $320.00 (the balance of the fine) at one time, and if this appeal fails, he will, upon remand to custody, again be committed to the City prison farm in lieu of payment of the remaining fine, at $5.00 a day for 64 more days.

On the other hand, it should be emphasized that Relator appeared six times before the Corporation Judge, pleading "not guilty" five times, and lacking further resolution, ceased to the plea of "nolo-contendere" for the sixth and the last time. It was upon this plea that Relator was found "guilty" on all offenses charged, and fines were imposed on nine traffic violations; the Court "struck off" fifty dollars traffic fines on all, save one. (c/f agreed stipulations). On none of these appearances, were the fiscal abilities of the Relator alluded to as a matter of fact, there were no probes made, relative to his capacity to pay a fine-meanwhile his family was on relief. (s/f p. 28).

ARGUMENT AND AUTHORITIES

POINT I

IMPRISONMENT OF RELATOR, AN INDIGENT, TO THE CITY PRISON FARM IN CUSTODY OF THE CHIEF OF POLICE OF THE CITY OF HOUSTON, TEXAS, UNTIL RELATOR SHALL HAVE PAID TRAFFIC FINES TOTALLING $425.00, WHERE RELATOR WAS UNABLE TO PAY SUCH FINES, VIOLATED THE EIGHTH AMENDMENT PROHIBITION AGAINST EXCESSIVE, CRUEL AND PUNISHMENT.

It is undisputed that Relator has no funds, or property, and is unable to pay the traffic fines imposed upon him by the Corporation Court of Houston, Texas. He must therefore discharge the fines in full service in jail at the rate

of five dollars ($5.00) per day.[1] The By-laws and Ordinances of the City of Houston are enforced by a fine not to exceed two hundred dollars ($200.00).[2] The sentencing court by imposing fifty dollar ($50.00) fines each for eight traffic infractions, and one twenty-five dollar ($25.00) fine for one traffic case would prompt the Relator to suggest that though his indigency must have been obviously discernable, it apparently mattered little in the eventual assessment of the fines. Four hundred and twenty-five dollars ($425.00) is an enormous amount of money for the Relator, and represents more than the equivalent of four disability checks which Relator receives from the Veteran's Administration monthly. It would seem that the sentencing Court could have been more tolerant in measuring and prescribing justice, especially after the six appearances by Relator before it.

The Relator is not unaware that is is generally settled that a direction in a sentence imposing a fine that Defendant stand committed until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the Court.

However in *Chapman* v. *Selover*, 225 N.Y. 417, 421, Judge Cardozo elaborated on this by explaining that the "State when it punishes misdemeanors by fine, is not confined to the dubious remedy of a civil action for a penalty." Imprisonment is, he explained, another remedy which the State may employ against "The offender who REFUSES to pay."

Lest it be overlooked, the Relator, unlike the more affluant Defendant, does not carry the "keys to the jail in his pocket," and his predicament, is made hopeless by the imposition of a fine he is unable to pay. Moreover the failure, at any time previous to his being committed, to inquire into his economic capabilities further underscores the premise that the punishment is so dispropor-

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[1] Houston Code, Sec. 15-60, Corporation Courts, (committment to jail until the full amount of the fine is paid); and see also, Houston Code, Sec. 35-8 Prisoners, (Credit against fine for service in jail or municipal prison farm—generally).

[2] Houston Code, Art. 11, Sec. 12, Charter, (Fines for violation of Ordinances.)

tionate to the offense, that it violates the excessive, cruel and unusual punishment clause of the Federal as, well as the State, constitutions. *Nemeth* v. *Thomas* 35 USLW 2320 (N.Y. Sup. Ct. Dec. 5, 1966); *Robinson* v. *California*, 370 US 660 (1962).

"Robinson" points out that drug addiction is an involuntary "status" and a state law which made the "status" of narcotic addiction, a criminal offense requiring imprisonment in the County Jail of at least 90 days, inflicted cruel and unusual punishment.[3]

Relator relies heavily on "Robinson" and would apply the rationale there to his involuntary "status" of indigency. Consequently any state law or ordinance which makes a prisoner out of a poor man because he cannot pay a fine, but forces him to work the fine off or lay out in jail, inflicts excessive, cruel and unusual punishment.

POINT II

IMPRISONMENT OF RELATOR, AN INDIGENT, TO THE CITY PRISON FARM IN CUSTODY OF THE CHIEF OF POLICE OF THE CITY OF HOUSTON, TEXAS, UNTIL RELATOR SHALL HAVE PAID TRAFFIC FINES TOTALLING $425.00, WHERE RELATOR IS UNABLE TO PAY SUCH FINES VIOLATES HIS EQUAL PROTECTION GUARANTEES UNDER THE FEDERAL AND STATE CONSTITUTIONS

The sentences complained of lay an unconstitutionally unequal penalty upon the Relator. In a manner of speaking, they gave him the alternative of paying his entire debt to the State in dollars rather than in days. In effect, however, it left him no *choice* but serve a term of imprisonment that any person more affluent could have, and probably would have avoided serving.

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[3] *Robinson* v. *California*, 82 SCT 1417, p. 1421. To be sure imprisonment for ninety days is not, in the abstract a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the "crime" of having the common cold.

The sentencing judge knew of Relator's predicament, and it goes without saying that the discriminatory character of the sentences is manifest.

No court without some reasonable installment method of payment should be permitted to be so arbitrary as to order the jailing of a Defendant simply because he is impecunious, and as we have noted before, imprisonment for non-payment of a fine, "can validly be used only as a method of collecting for a refusal to pay a fine, "and that it is illegal to imprison a Defendant who is financially unable to pay". This is particularly true in cases where inquiry into the Defendant's capacity to pay is avoided. *Martin* v. *Erwin* (# 13084) Supplemental Order, U.S. District Court, Western District, La., Feb. 27, 1968). *United States* v. *Doe et al*, 101 F. Supp. 609, (1951); *People* v. *Saffore* 218 NE 2 689; *People* v. *Collins* 261 NYS 2d 970; *People* v. *McMillan* 279 N.Y.S. 2d 941, *Spinler* v. *Montana*, Mont. S. Ct. No. 11536 (Nov. 1968); *In Re Figueroa* California Sup. Ct. Mendocino Co., No. 4502-c (Nov. 1968); *Beckham* v. *Purdy*, JE (S.D. Fla.) No. 69-64-Civ. (Mar. 1969).[4]

Beginning 13 years ago in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Supreme Court has been making it ever more emphatic that the Fourteenth Amendment include an indigent person accused of crime when it declares:

> ". . . nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

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[4] Chief Judge Hincks, in *United States* v. *Doe et al* commented that the sentencing judge will need all available information as to a Defendant's capacity to pay a fine, as it is not sound sentencing policy to impose fines beyond the capacity of the Defendant to pay (101 F. Supp. 609, p. 613, note 6)

In Beckham v. *Purdy*, the Court set out the following precept as having been established in Federal Law:

> ". . . a Court is not powerless to compel a contumacious Defendant to pay a fine imposed as punishment in lieu of imprisonment, but imprisonment as a method of compelling payment of a fine may not be used in the case of an indigent who, although willing to do so, is without funds to pay the fine in order to avoid the alternative term of imprisonment. (U.S. District Court, Southern District, Florida, No. 69-64-Civ-JE, at pg. 4 of opinion.

Subsequent decisions, relying on the "Griffin" rationale hold that the imprisonment in lieu of fine discriminated between indigent and solvent Defendants in violation of the equal protection clause. For example in *People* v. *Collins* (supra, note /4) the court said:

> It is only if we equate the payment of the fine with the additional period of detention in prison that both men can be said to stand dqual before the law. An equation of one day of a man's liberty in jail for every dollar of the fine, in this enlightened era, should be examined very carefully before this form of equality of treatment is endorsed.

Relator submits that the decisions listed in this portion of his argument are the only sound response to the Constitutional imperative that equal justice in criminal cases not be made to stand aside because the Defendant is without money.

CONCLUSION

We disagree with the State's contention, in her appellate brief, that the transcript does not reveal error of constitutional proportion.

The policy behind the practice for nonpayment of fines is to provide a means of collecting the fines. This policy consideration, though effective when the Defendant is merely unwilling to pay the fine, is inapplicable when the Defendant is unable to pay the fine.

Imprisonment of indigents for nonpayment invariably results in a drain on the state's revenues. The State does not receive the initial fine and must spend money to maintain the indigent-Defendant in jail. If the indigent Defendant is the head of the household, his imprisonment will result in the liklihood, (as in Relator's case) that his family will have to turn to state welfare agencies for aid.

It may be said that the state is justified in punishing an indigent prison to prevent his eluding, without pain, the penalty a nonindigent suffers in paying a fine. It may be further argued that the penalties, while different in form, are equal in burden. In theory, perhaps, a days

imprisonment may have its price in dollars, and the two may be equated. But that is plainly not true here, where the equalization rate was fixed at one day in jail for each five dollars of the fine, even though the legislature has recently divised a minimum wage law of a dollar and a quarter an hour. No one can seriously contend that such a penalty falls with equal severity on a man who can pay it, and a man who cannot.

WHEREFORE, PREMISES CONSIDERED, Relator prays that he be Discharged.

Respectfully Submitted,

/s/ Peter S. Navarro, Jr.
PETER S. NAVARRO, JR.
Attorney for Relator
6731 Harrisburg Blvd.
Houston, Texas 77011
928-3943

CERTIFICATION

I certify that a true copy of the Relator's Brief was mailed by United States Certified Mail, postage prepaid, to Honorable Carol S. Vance, District Attorney, Criminal Courts Building, Houston, Texas, 77002, Attorney for the State, on the 24th day of June, 1969.

/s/ Peter S. Navarro, Jr.
PETER S. NAVARRO, JR.
Attorney for Relator
6731 Harrisburg Blvd.
Houston, Texas 77011
928-3943

A true Copy
Attest: Glenn Haynes, Clerk
Court of Criminal Appeals of Texas
By: /s/ Troy Bennett
Deputy
[SEAL]

No. 42,209

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS
AT AUSTIN, TEXAS

EX PARTE PRESTON A. TATE

Appeal from the County Criminal Court at Law No. 1
of Harris County, Texas

STATE'S APPELLATE BRIEF

JIM VOLLERS
State's Attorney
Austin, Texas

CAROL S. VANCE
District Attorney
Harris County, Texas

PHYLLIS BELL
Assistant District Attorney
Harris County, Texas
Counsel for Appellee

[Filed in Court of Criminal Appeals, Jun 19 1969
Glenn Haynes, Clerk]

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant was granted a writ of habeas corpus in the County Criminal Court at Law No. 1 of Harris County, Texas, hearing on which was held on August 30, 1968.

The officer's return on said writ recited that Appellant was being held by virtue of committments issued by Corporation Court No. 3 of the City of Houston, Texas, ordering that Relator be committed to the City Prison Farm in custody of the Chief of Police of the City of Houston.

After the hearing on the writ, the court denied the application and remanded Appellant to the Chief of Police of the City of Houston, Texas. Appeal is taken from this order.

There is a transcription of the court reporter's notes of the hearing. Evidence therein is ample to support the action of the court. There are no formal bills of exception. There is a stipulation in the transcript that Appellant was committed to the City Prison Farm until he paid fines totaling $425.00. Appellant makes no showing that he has served enough time to entitle him to release under the provisions of Art. 45.53 VAACP. On the contrary, the Appellant affirmatively asserts in his application for the writ of habeas corpus that he is required to serve seventy-two more days in the prison to satisfy the said Art. 45.53.

Appellant has assigned no error by brief on appeal filed with the trial court, and the transcript does not reveal error of constitutional proportion. All proceedings appear to be regular, and nothing is presented for review.

Wherefore, premises considered, it is respectfully prayed that this remand be affirmed.

Respectfully submitted,

JIM VOLLERS
State's Attorney
Austin, Texas

CAROL S. VANCE
District Attorney
Harris County, Texas

/s/ Phyllis Bell
PHYLLIS BELL
Assistant District Attorney
Harris County, Texas

Certificate of Service

I certify that a true copy of the foregoing State's Appellate Brief was mailed by United States Certified Mail, postage prepaid, to Mr. Peter S. Navvaro, 6731 Harrisburg, Houston, Texas, 77011, Attorney for Appellant, on the 20th day of June, A. D. 1969.

/s/ Phyllis Bell
PHYLLIS BELL
Assistant District Attorney
Criminal Courts Building
Houston, Texas 77002
/telephone: 228-8311

A True Copy
Attest: Glenn Haynes, Clerk
Court of Criminal Appeals of Texas
By: /s/ Troy Bennett
Deputy

FROM:

THE COUNTY CRIMINAL COURT AT LAW NO. 1
OF HARRIS COUNTY, TEXAS

42209

PRESTON A. TATE, APPELLANT

vs.

HERMAN SHORT, Chief of Police of the
City of Houston, Texas, APPELLEE

Counsel for Appellant:

MR. PETER S. NAVARRO
6731 Harrisburg Street
Houston, Texas, 77011

[Filed in Court of Criminal Appeals, May 15, 1969,
Glenn Haynes, Clerk.]

INDEX

IN THE COUNTY CRIMINAL COURT AT LAW NO. 1
OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS

COUNTY OF HARRIS

At a regular Term of the County Criminal Court at Law No. 1, of Harris County, Texas, begun and holden within and for the County of Harris, and State of Texas, at Houston on the 5th day of August, A. D., 1968, and which adjourned on the 5th day of October A. D. 1968, the Honorable Lee Duggan, Jr., Judge thereof presiding, the following cause came on for trial, to-wit:

No. 245832

EX PARTE: PRESTON A. TATE

vs.

HERMAN SHORT, Chief of Police of the
City of Houston, Texas

HABEAS CORPUS FOR RELEASE

245832

STATE OF TEXAS)
) ss
COUNTY OF HARRIS)

TO THE HONORABLE JUDGE OF THE COUNTY CRIMINAL COURT NO. 1 OF HARRIS COUNTY, TEXAS:

The undersigned attorney for and on behalf of Petitioner, Preston A. Tate, represents unto the Court that said Preston A. Tate is illegally restrained of his liberty in Harris County, Texas, by Herman Short, Chief of Police of the City of Houston, Texas; and the said confinement and restraint is not by virtue of any writ, order or process save by an informal Order of Committment in

lieu of payment of a accumulated fine of Four Hundred Twenty-Five and No/100 ($425.00) Dollars. Because of the informal nature of the said committment or committments, a copy or copies cannot be obtained to annex hereto, though your Affiant attaches hereto, the affidavits of Preston A. Tate, and his wife, Adah R. Tate, wherein references to various cause numbers are asserted, the same being germane to the said Preston A. Tate's illegal restraint by the said Herman Short.

Wherefore, Premises Considered, Petitioner, Preston A. Tate prays the Court to grant and issue the writ of Habeas Corpus to have the said Preston A. Tate forthwith brought before this Honorable Court to the end that he may be discharged from such illegal confinement and restraint.

/s/ Peter S. Navarro, Jr.
PETER S. NAVARRO, JR.
Attorney for Preston A. Tate
6731 Harrisburg Street
Houston, Texas 77011
WA 8-3943

I do, under oath, declare that the allegations of the foregoing petition are true according to my belief.

/s/ Peter S. Navarro, Jr.
PETER S. NAVARRO, JR.

SWORN and SUBSCRIBED to on this the 26th day of August, A.D. 1968.

/s/ [Illegible]
Notary Public in and for
Harris County, Texas

[NOTARY SEAL]

My commission expires June 1, 1969

CITY OF HOUSTON PRISON FARM

STATE OF TEXAS)
) ss
COUNTY OF HARRIS)

Before me, the undersigned authority, personally appeared Preston A. Tate, who by me being duly sworn, deposes and says the following:

I am imprisoned, as a result of being unable to pay a fine in the above numbered and entitled causes.

Because I am too poor, I am, therefore, unable to pay the accumulated fine of $425.00, thus:

Cause Number	Fine	Caption
6611 - 2867	$50.00	No Texas operator's license
6610 - 6468	50.00	No Texas Operator's license
6610 - 6467	50.00	Illegal Registration
6610 - 5986	50.00	Run Stop Sign
6610 - 5985	50.00	No Texas Operator's License
6610 - 5988	50.00	Expired License Plates
6611 - 2866	50.00	Expired License Plates
6605 - 1910	50.00	May 27, 1966 - Capias pro-fine Run Red Light
6605 - 1911	25.00	May 27, 1966 - Capias pro-fine No Texas operator's license

And I cannot elect to satisfy the fine by payment of same as a result of my poverty.

Because of my imprisonment, my ability to gain a livilihood is fundamentally and seriously impaired.

I urge consideration of this affidavit, not only for myself, but for my wife, Adah Tate and my two sons, Robert Preston, age 2, and David Keith, age 8 weeks, all of whom are dependent upon me for their support and welfare.

/s/ Preston A. Tate
PRESTON A. TATE

SWORN TO AND SUBSCRIBED before me this 20th day of August, 1968, by said affiant while under oath.

/s/ [Illegible]
Notary Public in and for
Harris County, Texas

[NOTARY SEAL]

IN RE: PRESTON A. TATE

STATE OF TEXAS

COUNTY OF HARRIS

This is to state under oath that the undersigned, Adah R. Tate, is the lawful wife of Preston A. Tate, and that the said Preston A. Tate is without resources to pay for various fines said to be due to the City of Houston, Texas; that said party was arrested on or about August 7, 1968; that the total fines set by the Court amounted to $425.00, whereas there is as of this day a credit of $65.00 or a total of 13 days at $5.00 and that Mr. Tate would not be discharged from his present confinement until he may have served 72 more days at the City of Houston Prison Farm, from date hereof.

Whereas such confinement would create a very severe hardship on myself and our two (2) children, one male child, ROBERT PRESTON TATE, age 1 year 11 months and DAVID EITH TATE, age 8 weeks old by virtue of the fact that I am not employable as being needed at home and since our sole income is $104.00 per month from Mr. Tate's Veteran Administration Disability Pension.

Wherefore, it is stated that the continued confinement of PRESTON A. TATE creates a very severe hardship upon us due to the foregoing.

/s/ Adah R. Tate
ADAH R. TATE

SWORN TO AND SUBSCRIBED before me this 19th day of August, 1968, by said affiant while under oath.

/s/ [Illegible]
Notary Public in and for
Harris County, Texas

[NOTARY SEAL]

THE STATE OF TEXAS,

To Herman Short
Chief of Police—City of Houston, Texas

Greeting:

YOU ARE HEREBY COMMANDED to produce and have before Hon. Lee Duggan, Jr. Judge of the County Criminal Court at Law No. 1 of Harris County, Texas, at Houston, Texas, in the said County and State, on the 30th day of August, 1968, at 2 o'clock P.M., the person and body of Preston A. Tate whom it is alleged you illegally restrain of his liberty, when and where you will show why you hold the said Preston A. Tate in custody and restrain him of his liberty.

HEREIN FAIL NOT, but of this Writ make due return as the law directs.

Witness my official signature at Houston, Texas. this the 27th day of August 1968.

/s/ Lee Duggan, Jr.
Judge Presiding

Bail fixed at $500.00 pending hearing.

RETURN OF PERSON EXECUTING WRIT

(Arts. 177, 178, C. C. P.)

Came to hand the ____ day of _____ 19____, at _____ o'clock ____M., and executed the ____ day of _____ 19____, by delivering to the within named _____ in person, a true copy of this Writ.

_____

_____

Sworn to and subscribed before me, this ____ day of _____ 19____.

_____

_____

Return of Person Restraining Prisoner

(Arts. 179, 180, C. C. P.)

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

I, _____ of said County of Harris, in obedience to the within Writ of Habeas Corpus, have herewith the body of the within named _____ before the said _____; and for return of said Writ do state that said _____ is in my custody as _____ of said County, by virtue of a certain _____ issued by _____ on the ___ day of _____, 19, ___, by which I was commanded to take the body of the said _____ and him safely keep, and have him before _____ to answer a charge of _____ preferred against him by _____ a copy of which said _____ is annexed hereto:

_____

_____

Sworn to and subscribed before me, this ___ day of _____, 19___.

_____

_____

CO. CRIM. CT. AT LAW #1

No. 245832

WRIT OF HABEAS CORPUS

Returnable August 30, 1968 @ 2:00 P.M.

THE STATE OF TEXAS

vs.

EX PARTE: PRESTON A. TATE

Issued: August 28, 1968

RAY HARDY
District Clerk
Harris County, Texas

By: /s/ T. Allen
Deputy

[Filed: August 28, 1968. Ray Hardy, District Clerk, Harris County, Texas. By: T. Allen, Deputy.]

WRIT OF HABEAS CORPUS, TOGETHER WITH THE RETURN OF THE SHERIFF THEREON. FILED: AUGUST 28, 1968.

THE STATE OF TEXAS,

To Herman Short
Chief of Police—City of Houston, Texas

Greeting:

YOU ARE HEREBY COMMANDED to produce and have before Hon. Lee Duggan, Jr. Judge of the County Criminal Court at Law No. 1 of Harris County, Texas, at Houston, Texas, in the said County and State, on the 30th day of August, 1968, at 2 o'clock P.M., the person and body of Preston A. Tate whom it is alleged you illegally restrain of his liberty, when and where you will show why you hold the said Preston A. Tate in custody and restrain him of his liberty.

HEREIN FAIL NOT, but of this Writ make due return as the law directs.

Witness my official signature at Houston, Texas.
this the 27th day of August 1968.

/s/ Lee Duggan, Jr.
Judge Presiding

Bail fixed at $500.00 pending hearing.

RETURN OF PERSON EXECUTING WRIT

(Arts. 177, 178, C. C. P.)

Came to hand the 28 day of August 1968, at 11:12 o'clock A.M., and executed the 25 day of August 1968, by delivering to the within named George L. Seber @ 12:05 P.M. in person, a true copy of this Writ.

/s/ [Illegible]
/s/ [Illegible]

Sworn to and subscribed before me, this 28 day of August 1968.

/s/ [Illegible]

[NOTARY SEAL]

Return of Person Restraining Prisoner

(Arts. 179, 180, C.C.P.)

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

I, _____ of said County of Harris, in obedience to the within Writ of Habeas Corpus, have herewith the body of the within named _____ before the said _____; and for return of said Writ do state that said _____ is in my custody as _____ of said County, by virtue of a certain _____ issued by _____ on the ___ day of _____, 19___, by which I was commanded to take the body of the said _____ and him safely keep, and have him before _____ to answer a charge of _____ preferred against him by _____ a copy of which said _____ is annexed hereto:

_____

_____

Sworn to and subscribed before me, this ___ day of _____, 19___.

_____

_____

CO. CRIM. CT. AT LAW #1

No. 245832

WRIT OF HABEAS CORPUS

Returnable August 30, 1968 @ 2:00 P.M.

THE STATE OF TEXAS

vs.

EX PARTE: PRESTON A. TATE

Issued: August 28, 1968

RAY HARDY
District Clerk
Harris County, Texas

By: /s/ T. Allen
Deputy

RETURN OF HERMAN SHORT, CHIEF OF POLICE
FILED: SEPTEMBER 5, 1968.

THE STATE OF TEXAS,

To Herman Short
Chief of Police—City of Houston, Texas

Greeting:

YOU ARE HEREBY COMMANDED to produce and have before Hon. Lee Duggan, Jr. Judge of the County Criminal Court at Law No. 1 of Harris County, Texas, at Houston, Texas, in the said County and State, on the 30th day of August, 1968, at 2 o'clock P.M., the person and body of Preston A. Tate whom it is alleged you illegally restrain of his liberty, when and where you will show why you hold the said Preston A. Tate in custody and restrain him of his liberty.

HEREIN FAIL NOT, but of this Writ make due return as the law directs.

Witness my official signature at Houston, Texas.
this the 27th day of August 1968.

/s/ Lee Duggan, Jr.
Judge Presiding

Bail fixed at $500.00 pending hearing.

[Filed Sep. 5, 8:30 a.m., '68, Ray Hardy,
Dist. Clerk, Harris County, Texas.]

RETURN OF PERSON EXECUTING WRIT

(Arts. 177, 178, C. C. P.)

Came to hand the .... day of ..... 19...., at ..... o'clock ....M., and executed the .... day of ..... 19...., by delivering to the within named ..... in person, a true copy of this Writ.

.....

.....

Sworn to and subscribed before me, this .... day of ..... 19....

.....

.....

RETURN OF PERSON RESTRAINING PRISONER

(Arts. 179, 180, C. C. P.)

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

I, W. T. Higgins of said County of Harris, in obedience to the within Writ of Habeas Corpus, have herewith the body of the within named Preston A. Tate, released on bond as per order of this instrument and release No 43829; and for return of said Writ do state that said Preston A. Tate was in my custody as prisoner of said County, by virtue of a certain Commitments and Capias Pro Fines issued by Corp. Court No. 3, City of Houston, Texas on the 7 day of August, 1968, by which I was commanded to take the body of the said Preston A. Tate

and him safely keep, and have him before Judge Lee Duggan, Jr. or to release him on bond as ordered. to answer a charge of ..... preferred against him by .....

a copy of which said ..... is annexed hereto:

H. B. SHORT
Chief of Police

/s/ W. T. Higgins
Capt., Jail Division

Sworn to and subscribed before me, this 30 day of August, 1968.

/s/ T. J. Lero
T. J. LERO
Notary Public in and for
Harris County, Texas

[NOTARY SEAL]

CO. CRIM. CT. AT LAW #1

No. 245832

WRIT OF HABEAS CORPUS

Returnable August 30, 1968 @ 2:00 P.M.

THE STATE OF TEXAS

vs.

EX PARTE: PRESTON A. TATE

Issued: August 28, 1968

RAY HARDY
District Clerk
Harris County, Texas

By: /s/ T. Allen
Deputy

JUDGMENT OF THE COURT AND NOTICE OF APPEAL
RECORDED: VOLUME 14, PAGE 238

HABEAS CORPUS

MINUTES OF THE COUNTY CRIMINAL COURT
AT LAW NO. 1 OF HARRIS COUNTY, TEXAS.
AT AUGUST TERM, A. D. 1968

No. 245832

PRESTON A. TATE

vs.

THE STATE OF TEXAS

August 30th, A. D. 1968

HABEAS CORPUS

THIS DAY came on to be heard before me this application for the Writ of HABEAS CORPUS against Herman Short, Chief of Police, City of Houston, Texas, and the said respondent Herman Short, Chief of Police, City of Houston, Texas, having made due return of the said Writ of HABEAS CORPUS herein served upon him and having produced before me the person of the said Preston A. Tate I proceeded to hear the said application, and after having examined the Writ and the return of the respondent Herman Short, Chief of Police, City of Houston, Texas, and all papers and documents attached thereto, and having heard the testimony offered on both sides, I am of the opinion that legal cause has been shown for the imprisonment or restraint of the said Preston A. Tate. I am of the opinion that the said Preston A. Tate is legally held in custody and under restraint of his liberty by the said respondent Herman Short, Chief of Police, City of Houston, Texas. It is therefore ordered and adjudged that the application of the said Preston A. Tate herein be denied, and that the said Preston A. Tate be and he is now hereby remanded to the custody of the

said respondent Herman Short, Chief of Police, City of Houston, Texas.

To which action of the Court the Relator in open court excepts and gives notice of Appeal to the Court of Criminal Appeals of the State of Texas at Austin, Texas.

$500.00 Bond remains in effect pending ruling by the Court of Criminal Appeals in Austin, Texas.

[Recorded: Volume 14, Page 238 General Minutes County Criminal Court at Law No. 1 of Harris County, Texas.]

HABEAS CORPUS BOND

FILED: AUGUST 29, 1968

No. 245,832

EX PARTE: PRESTON A. TATE

HABEAS CORPUS BOND

THE STATE OF TEXAS)
) ss
COUNTY OF HARRIS)

KNOW ALL MEN BY THESE PRESENTS THAT we PRESTON A. TATE, (Applicant) as principal, and other signers hereto, as sureties, are held and firmly bound unto the State of Texas, in the full and just sum of FIVE HUNDRED AND 00/100 ($500.00) DOLLARS, for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally; And in addition thereto, we are bound for the payment of all fees and expenses that may be incurred by peace officers in rearresting principal in the event the condition of this bond are violated. For the payment of which sum or sums well and truly to be made, we do bind ourselves and each of us, our heirs, executors and administrators, jointly and severally by these presents:

WHEREAS, the above bounden Principal (Applicant) was on or about the 17th day of August, A.D., 1968, found guilty of the following offenses:

Cause Number	Fine	Caption
6611 - 2867	$50.00	No Texas operator's license
6610 - 6468	50.00	No Texas operator's license
6610 - 6467	50.00	Illegal Registration
6610 - 5986	50.00	Run Stop Sign
6610 - 5985	50.00	No Texas Operator's License
6610 - 5988	50.00	Expired License Plates
6611 - 2866	50.00	Expired License Plates
6605 - 1910	50.00	May 27, 1966 - Capias pro-fine Run Red Light
6605 - 1911	25.00	May 27, 1966 - Capias pro-fine No Texas Operator's License

WHEREAS the said Applicant (Principal) did apply to the County Criminal Court No. One of Harris County, Texas, for a Writ of Habeas Corpus, and,

WHEREAS the Judge of said County Criminal Court at Law No. One, did on the 27th day of August, A.D., 1968, grant and issue a Writ of Habeas Corpus directed to Herman Short, Chief of Police, Houston, Texas, commanding him to produce before said Court, the above bounden Principal (Applicant) on the 30th day of August, A.D. 1968, at Two (2:00) O'Clock P.M. in the Court Room of said Court, in the City of Houston, Harris County, Texas, and at said time and place to show why Applicant is held in custody or restrained by him, the said Chief of Police.

WHEREAS, said Court did fix the amount of bail pending the examination or hearing upon said Writ at Five Hundred ($500.00) Dollars,

NOW, THE CONDITION OF THE ABOVE BOND is such that if the above bounden Principal (Applicant) shall make his personal appearance as required by law before the said Court in the Court Room of said Court in the City of Houston, Harris County, Texas, on the 30th day of August A.D., 1968, at Two O'Clock P.M. and there to remain from day to day and not depart until discharged by due course of law, then the above bond to be null and voil, otherwise to be and remain in full force and effect.

WITNESS our hands the 28th day of August, A.D., 1968.

/s/ Preston A. Tate
Principal
/s/ Howard G. Cook
Surety
/s/ Kathryn B. Cook
Surety

Taken and approved by me
this 28th day of August, 1968.

/s/ Lee Duggan, Jr.
Judge presiding
County Court at Law No. 1
Harris County, Texas

Taken & Approved by me
this 28th day of August, 1968

C. V. (BUSTER) KERN
by: /s/ [Illegible]
Deputy

[Filed (Date and Time Illegible), Ray Hardy, Dist. Clerk, Harris County, Texas.]

APPEARANCE BOND—County Criminal Court at Law No._____

THE STATE OF TEXAS }
COUNTY OF HARRIS }

KNOW ALL MEN BY THESE PRESENTS:

That we,_____, as principal, and the undersigned, HORACE G. COOK KATHRYN E. COOK as sureties, are held and firmly bound unto the STATE OF TEXAS, in the penal sum of

_____DOLLARS, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly, by these presents.

The condition of the above obligation is such, that, whereas, the above bound principal_____ has been arrested by C. V. BUSTER KERN, Sheriff of Harris County, Texas, on a charge of a misdemeanor, by virtue of a capias, issued to said Sheriff by R. J. Lindley, ex-officio Clerk of County Criminal Court at Law No. _____ of Harris County, Texas.

Now if the said principal shall be and personally appear instanter at the present term of the County Criminal Court at Law No. _____ of Harris County, Texas, now in session in and for the County of Harris, at the Court House thereof, in the City of Houston, Texas, there to remain in attendance from day to day and from term to term until discharged by due order of the Court, to answer the State aforesaid on said charge of a misdemeanor and not to depart the Court, without leave, then, and in that case, this bond to be null and void, otherwise to remain in full force and effect and in addition thereto, we are bound for the payment of all necessary and reasonable expenses incurred by any and all sheriffs or other peace officers in re-arresting the principal in the event he fails to appear before the court or magistrate named in the bond at the time stated therein.

Witness our hands this the_____ day of_____ A. D. 19____

Taken and approved this_____

day of_____, A. D. 19____

_____
Principal

C. V. BUSTER KERN, Sheriff, Harris County, Texas.

_____
Address Phone

By_____, Deputy

Surety

Filed_____

CA 3-8377

Address

OVERSIZE PAGE – SEE NEXT FRAME FOR REMAINDER OF PAGE

undersigned, HORACE E. COOK KATHRYN E. COOK

as sureties, are held and firmly bound unto the STATE OF TEXAS, in the penal sum of

_____ DOLLARS,

for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly, by these presents.

The condition of the above obligation is such, that, whereas, the above bound principal _____

_____ has been arrested by C. V. BUSTER KERN, Sheriff of Harris County, Texas, on a charge of a misdemeanor, by virtue of a capias, issued to said Sheriff by R. J. Lindley, ex-officio Clerk of County Criminal Court at Law No. _____ of Harris County, Texas.

Now if the said principal shall be and personally appear instanter at the present term of the County Criminal Court at Law No. _____ of Harris County, Texas, now in session in and for the County of Harris, at the Court House thereof, in the City of Houston, Texas, there to remain in attendance from day to day and from term to term until discharged by due order of the Court, to answer the State aforesaid on said charge of a misdemeanor and not to depart the Court, without leave, then, and in that case, this bond to be null and void, otherwise to remain in full force and effect and in addition thereto, we are bound for the payment of all necessary and reasonable expenses incurred by any and all sheriffs or other peace officers in re-arresting the principal in the event he fails to appear before the court or magistrate named in the bond at the time stated therein.

Witness our hands this the _____ day of _____ A. D. 19____.

Taken and approved this _____

day of _____, A. D. 19____

C. V. BUSTER KERN, Sheriff, Harris County, Texas.

By _____, Deputy

Filed _____

By _____, Deputy

FILED

_____ Principal

_____ Address Phone

Horace E. Cook Surety

[illegible] SUITE 211 HOUSTON, TEXAS 77002 CA 3-8377

Address Phone

Kathryn E. Cook Surety

[illegible] CA 3-8377

Address Phone

Surety

Address Phone

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THE STATE OF TEXAS }
COUNTY OF HARRIS }

Before me, the undersigned authority, a Notary Public in and for said State and County, on this day personally appeared ______ G. COOK ______, to me well known, and known to me to be a creditable person, who, after being by me first duly sworn, on oath, deposes and says as follows, to-wit:

That the affiant desires and proposes to become a surety on the bond of [illegible], in connection with [illegible] [illegible]

and in order to induce C. V. BUSTER KERN, Sheriff, Harris County, Texas, ______

the official charged with the duty of approving or accepting said bond, to accept the bond of said [illegible] with the affiant and another or others as sureties thereon, makes the following statement concerning affiant's financial condition and with reference to properties owned by affiant, to-wit:

That affiant is the sole owner of the following described properties; that each piece of the same is presently of the market value set opposite each piece of the same; that the same is encumbered only to the extent and in the amount set opposite each piece of said property, and that each piece of the same, after deducting the amount of the encumbrance shown from the present market value thereof, has the net value set opposite each piece thereof, to-wit:

LOCATION AND DESCRIPTION	PRESENT MARKET VALUE	ENCUMBRANCE	NET VALUE
Lot 1, Blk 14 Oak Forest and other properties in Harris County, Texas	$113,000.00	$35,000.00	$78,000.00
Plus affidavit on file with Sheriff's office			

That none of the property above described is affiant's homestead, and that the affiant is not using, and does not intend to use, the same, or any part thereof, for any homestead or business purpose. That no part of said property is exempt from forced sale under the laws of the State of Texas; that no part of said property is involved in litigation of any kind or character; that the title to the above described property is good of record and in fact in the affiant; that the affiant has never heard his title to any part of said property questioned by any person or corporation whomsoever, and that no part of the same is occupied by any person or corporation claiming adversely to the affiant.

That the following is a full and complete list and statement of all bonds of every kind and character on which the affiant is a surety or principal, and the amounts of such bonds, to-wit:

List on file with District Attorney

That there are no abstracts of judgment recorded in Harris County, Texas, or elsewhere, against the affiant.

That the affiant makes this statement for the purpose of inducing the approval and acceptance of said bond with himself as a surety thereon, well knowing and believing that the making of this statement will induce the official charged with the duty of accepting and approving said bond to accept and approve the same, and that all statements herein contained are true, SO HELP ME, GOD.

[illegible] Cook
Affiant—Surety

Subscribed and sworn to before me this the 28th day of August, A. D. 1968

by ______ G. COOK ______, affiant.

Witness my hand and seal of office this the 28th day of August A. D. 1968

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the official charged with the duty of approving or accepting said bond, to accept the bond of said Austin A Hite

with the affiant and another or others as sureties thereon, makes the following statement concerning affiant's financial condition and with reference to properties owned by affiant, to-wit:

That affiant is the sole owner of the following described properties; that each piece of the same is presently of the market value set opposite each piece of the same; that the same is encumbered only to the extent and in the amount set opposite each piece of said property, and that each piece of the same, after deducting the amount of the encumbrance shown from the present market value thereof, has the net value set opposite each piece thereof, to-wit:

LOCATION AND DESCRIPTION	PRESENT MARKET VALUE	ENCUMBRANCE	NET VALUE
Lot 1, Blk 14 Oak Forest and other properties in Harris County, Texas Plus affidavit on file with Sheriff's office	$113,000.00	$35,000.00	$78,000.00

That none of the property above described is affiant's homestead, and that the affiant is not using, and does not intend to use, the same, or any part thereof, for any homestead or business purpose. That no part of said property is exempt from forced sale under the laws of the State of Texas; that no part of said property is involved in litigation of any kind or character; that the title to the above described property is good of record and in fact in the affiant; that the affiant has never heard his title to any part of said property questioned by any person or corporation whomsoever, and that no part of the same is occupied by any person or corporation claiming adversely to the affiant.

That the following is a full and complete list and statement of all bonds of every kind and character on which the affiant is a surety or principal, and the amounts of such bonds, to-wit:

List on file with District Attorney

That there are no abstracts of judgment recorded in Harris County, Texas, or elsewhere, against the affiant.

That the affiant makes this statement for the purpose of inducing the approval and acceptance of said bond with himself as a surety thereon, well knowing and believing that the making of this statement will induce the official charged with the duty of accepting and approving said bond to accept and approve the same, and that all statements herein contained are true, SO HELP ME, GOD.

Affiant—Surety

Subscribed and sworn to before me this the 28th day of August, A. D. 1968

by Thomas A. Cook, affiant.

Witness my hand and seal of office this the 28th day of August, A. D. 1968

(NOTARY SEAL)

Notary Public in and for Harris County, Texas.

THE STATE OF TEXAS,
COUNTY OF HARRIS

Before me, the undersigned authority, a Notary Public in and for said State and County, on this day personally appeared Thomas A. Cook, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the 28th day of August, A. D. 1968.

(NOTARY SEAL)

Notary Public in and for Harris County, Texas.

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IN COUNTY CRIMINAL COURT AT LAW NO. 1
FRIDAY, AUGUST 30, 1968

245576 ROBERT FRANKLIN PRICE AGGR. ASSAULT JAIL

Waive right of counsel; Plea of ~~Guilty~~ Not Guilty; ~~30 days~~ 20 days in Harris County Jail; Credit 13 days. TEN DAYS TIME WAIVED, DEFENDANT SENTENCED

245580 JOSEPH CARL GAMEL D. W. I. JAIL

Waived right of counsel; Plea of Guilty; 5 days + $100.00; Credit 10 days.

TEN DAYS TIME WAIVED, DEFENDANT SENTENCED

245660 PHILLIP TERRY ROBERTSON THEFT JAIL

III Reset 9/3/68 ~~No~~ No Issue

245676 TONY GREEN AGGR. ASSLT. ON AN OFFICER JAIL

Waived right of counsel; Plea of Nolo Contendere; Guilty; #35.00; Credit 12 days TEN DAYS TIME WAIVED, DEFENDANT SENTENCED

244824 RONALD KENT FRANKS CARRYING PRO. WEAPON JAIL

III Reset 9/3/68 No Issue

245832 PRESTON A. TATE WRIT OF HABEAS CORPUS JAIL

2PM ~~Set~~ Hearing on Writ all parties present

245580 JOSEPH CARL GAMEL D. W. I. JAIL

Waived right of counsel; Plea of Guilty; 5 days + $100.00; Credit 10 days.

TEN DAYS TIME WAIVED, DEFENDANT SENTENCED

245660 PHILLIP TERRY ROBERTSON THEFT JAIL

III Reset 9/3/68 No Issue

245676 TONY GREEN AGGR. ASSLT. ON AN OFFICER JAIL

Waived right of counsel; Plea of Nolo Contendre; Guilty; #35.00; Credit 12 days TEN DAYS TIME WAIVED, DEFENDANT SENTENCED

244824 RONALD KENT FRANKS CARRYING PRO. WEAPON JAIL

III Reset 9/3/68 No Issue

245832 PRESTON A. TATE WRIT OF HABEAS CORPUS JAIL

2PM Hearing on Writ. All parties rest. Argument. Writ of Habeas Corpus denied & Relator remanded to custody. ~~Appeal Bond~~ ~~Set~~ to which Relator excepts & gives Notice of Appeal to Court of Criminal Appeals at Austin. ~~Bond~~ ~~Fixed~~

Bond #500 Bond to continue on Appeal.

[illegible] THEON TOWNSEND LV. CHECK JAIL

AFFIDAVIT OF INABILITY TO PAY COSTS
OR GIVE SECURITY THEREFOR
FILED: OCTOBER 31, 1968

IN THE COUNTY CRIMINAL COURT NUMBER ONE
OF HARRIS COUNTY, TEXAS

No. 245,832

EX PARTE: PRESTON A. TATE

AFFIDAVIT OF INABILITY TO PAY COSTS
OR GIVE SECURITY THEREFOR

TO THE CLERK AND COURT REPORTER OF SAID HONORABLE COURT:

Now comes PRESTON A. TATE, Petitioner, and having been duly sworn, makes the following statement:

I am too poor to pay the costs of court and Appeal in the above styled and numbered cause and I am unable to give security therefor.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Clerk prepare an appellate record and perform all other services required of him, in the same manner as if the costs had been paid or the security given, and that the Court Reporter prepare a statement of facts in question and answer form, the same to constitute part of the record.

/s/ Peter S. Navarro, Jr.
Attorney for Plaintiff
6731 Harrisburg Street
Houston, Texas 77011
WA 8-3943

/s/ Preston A. Tate
Petitioner

[Filed Oct. 31, 1968, Ray Hardy, District Clerk, Harris County, Texas, By /s/ (Illegible), Deputy.]

STATE OF TEXAS)
)
COUNTY OF HARRIS)

SWORN TO AND SUBSCRIBED before me by Preston A. Tate, this 11th day of October, 1968, to certify which witness my hand and seal of office.

/s/ Linda Naraiyo
Notary Public in and for
Harris County, Texas

[NOTARY SEAL]

ORDER OF THE COURT
FILED: NOVEMBER 14, 1968

IN THE COUNTY CRIMINAL COURT AT LAW
NUMBER ONE OF HARRIS COUNTY, TEXAS

No. 245,832

EX PARTE: PRESTON A. TATE

ORDER

THE AFFIDAVIT OF PRESTON A. TATE, Petitioner in above styled and numbered cause having been presented to this Court stating that Petitioner is too poor to pay costs of Court and appeal in above said cause of action and praying that the Clerk of said Court prepare an Appellate record and perform all other services required of him, in the same manner as if the costs had been paid or the security given, and that the Court Reporter prepare a statement of facts in question and answer form, the same to constitute a part of the record and it appearing to the Court that such petition is duly sworn to,

It is ORDERED, ADJUDGED and DECREED that Petitioner's application for a statement of facts and other relief as contained in said affidavit be heard before me at 2:30 o'clock P.M. on the 21 day of November, 1968, in the County Criminal Court at Law Number One Courtroom of Harris County, Texas.

/s/ Lee Duggan, Jr.
Presiding Judge

[Filed (Date and Time Illegible), Ray Hardy, Dist. Clerk, Harris County, Texas, By /s/ (Illegible), Deputy.]

DESIGNATION OF MATERIALS FOR INCLUSION
FILED: NOVEMBER 15, 1968

IN THE COUNTY CRIMINAL COURT NUMBER ONE
OF HARRIS COUNTY, TEXAS

No. 245,832

EX PARTE: PRESTON A. TATE

DESIGNATION OF MATERIALS FOR INCLUSION
IN THE RECORD

TO THE HONORABLE CLERK OF COUNTY CRIMINAL COURT AT LAW NUMBER ONE, HARRIS COUNTY.

COURT REPORTER:

Pursuant to Article 40.09 of the Texas Code of Criminal Procedures, the Relator, PRESTON A. TATE requests the following matter for inclusion in the record in the Appeal, to the Texas Court of Criminal Appeals, to wit:

1.) Petition For Writ of Habeas Corpus, and accompying affidavits;
2.) Order granting hearing on the Petition and Order setting bond;
3.) Order denying writ;
4.) Order continuing Relator's bond, pending appeal;
5.) Relator's Pauper's Oath;
6.) Transcription of all of the proceedings shown by the notes of the Reporter;
7.) All docket entries by the Court;
8.) All orders relating to the preparation of the record without payment of costs.

/s/ Peter S. Navarro, Jr.
PETER S. NAVARRO, JR.
Attorney for Relator-Appellant
6731 Harrisburg Street
Houston, Texas 77011
Wa 8-3943

[Filed (Date and Time Illegible), Ray Hardy, Dist. Clerk, Harris County, Texas, By /s/ (Illegible), Deputy.]

Willie R. Myles — F S G I — Steck

Plea of Guilty; #75.00;

Motion 12/11/68

245345 — Willie R. Myles — NOL — Steck

DISMISSED ON MOTION OF STATE Clerk

245346 — Willie R. Myles — Neg coll — Steck

Jury selected, empaneled & sworn; DEFENDANT, DULY ARRAIGNED ACCORDING TO LAW, IN OPEN COURT PLEADED Not Guilty; States evidence & rests. Def. rests without evid. Charge prepared & delivered to jury. Argument & Jury retired 3:33. Verdict: 3:41! Punishment Hearing. #5.00. Motion 12/11/68.

245564 — Joe Ray Blalack — Aggr assault

Reset 1/13/69 with capias

245832 — Preston A. Tate — Hearing

WAS 3743

Reset 11/22/68 No Issue

1.30

245880 — Loyd Russell Andrews — Speeding — Weimer

Reset 1/14/69 with capias

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245346 Willie R. Myles — Neg coll — Steck

Jury selected, empaneled & sworn; DEFENDANT, DULY ARRAIGNED ACCORDING TO LAW, IN OPEN COURT PLEADED NOT GUILTY; States evidence & State rests. Deft rests without evid. Charge prepared, filed & read to jury. Argument & Jury retired 3:33. Verdict: 3:41. ~~Punishment~~ Punishment ~~Hearing~~ Hearing. #5. Motion 12/11/68.

245564 Joe Ray Blalack — Aggr assault

Reset 1/13/69 with issue

245832 Preston A. Tate — Hearing

WAS 3943

1[30]

Reset 11/22/68 No Issue

245880 Loyd Russell Andrews — Speeding — Weimer

issue

Reset 1/14/69 with issue

✓ 246040 Marvin O. Cooper — Speeding — Heath

DISMISSED ON MOTION OF STATE T Hinton, T Asst. D.A.

St R — Held

✓ 246048 Delois W. Thomas, Jr. — Speeding — Kahn

N1

L. Kahn

DISMISSED ON MOTION OF STATE T Hinton T

249300	James Lee Fotherford James Clint Smith	Theft "	Jail "

Redet 12/3/68 No Issue

24645 James Robert Stanley DWIS. 3rd Farley
Redet 12/20/68 No Issue

247028 HERMAN EVERITT IVEY NEG. HOM
Redet 12-20-68 No Issue

245,832 PRESTON A. TATE WRIT.
Redet 11/27/68 with Writ
1st

246,044 CLEAMON J. PINNER Neg. Coll.

DISMISSED ON MOTION OF STATE Rancette
Asst. D.A.

	John D. Scott	W. check	

Reset 2/1/69 No Issue

244620	Rayfield Jackson	Inter of vocation	Fender

Reset 1/23/68 with issue.
Charge reset to State.

244656	Thomas Randolph Teague	Shoplifting	Mahas

DISMISSED ON MOTION OF STATE'S Atty Gen, By
Asst DA.

245328	Danny Anthony Bonetati	Neg coll	Gray

Reset 12/19/68 with issue

245724	James M. Benton	W. check	Galli

Reset 1/19/68 No issue

245808	Otha Lee Ethel alias James Brown, Jr.	Pistol	Kilgarlin

Plead GUILTY; 30 days.

TEN DAYS TIME STARTED, DEFENDANT SENTENCED

244656	Thomas Randolph Teague	Shoplifting	Nahas
	DISMISSED ON MOTION OF STATE Ellison, El Asst DA.		
245328	Danny Anthony Bonetati	Neg coll	Gray
	Reset 12/19/68 with [illegible]		
245724	James M. Benton	W. check	Galli
	Reset 1/19/68 No Issue		
245808	Otha Lee Ethel alias James Brown, Jr.	Pistol	Kilgarlin
	Plea of GUILTY; 30 days. TEN DAYS TIME WAIVED, DEFENDANT SENTENCED		
245828	Jordan M. Roman	Aggr assault	Alfano
	Reset 1/21/69 with [illegible]		
	4/8 R		
245832	Preston A. Tate	Hearing	
24	Hearing on Deft's Affidavit of Indigency. Held: Indigent. [illegible] ORDERED to prepare [illegible] Record as per [illegible]		

AGREED STIPULATIONS

FILED: MAY 13, 1969

IN THE COUNTY CRIMINAL COURT AT LAW #1
OF HARRIS COUNTY, TEXAS

No. 245,832

EX PARTE: PRESTON A. TATE

AGREED STIPULATIONS

IT is agreed and stipulated by and between Relator, PRESTON A. TATE, and the State of Texas, by his attorney, that the said C. RAYMOND JUDICE, if he testified, would testify he was appointed Recorder for the Corporation Court Number Three of Houston, Texas by the Mayor of the City of Houston. That he is a full time Recorder or Corporation Judge as that term is used in this City; that he is an Attorney—he is an Attorney-at-law, and was the Judge who heard evidence and sentenced and committed Relator after his arrest on August 7, 1968, to the City Prison Farm in custody of the Chief of Police of the City of Houston, Texas until he shall have paid fines totalling $425.00 in the following causes, to-wit:

Cause Number	Fine	Caption
6611 - 2867	$50.00	No Texas operator's license
6610 - 6468	50.00	No Texas operator's license
6610 - 6467	50.00	Illegal Registration
6610 - 5986	50.00	Run Stop Sign
6610 - 5985	50.00	No Texas Operator's License
6610 - 5988	50.00	Expired License Plates
6611 - 2866	50.00	Expired License Plates
6605 - 1910	50.00	May 27, 1966 - Capias pro-fine Run Red Light
6605 - 1911	25.00	May 27, 1966 - Capias pro-fine No Texas Operator's License

Signed this the 13 day of May A.D. 1969.

/s/ Joe S. Moss
JOE S. MOSS
Attorney for the
State of Texas

/s/ Peter S. Navarro, Jr.
PETER S. NAVARRO, JR.
Attorney for Relator

[Filed May 13, 1969, Ray Hardy, District Clerk, Harris County, Texas, By /s/ (Illegible), Deputy.]

IN THE COUNTY CRIMINAL COURT AT LAW NO. 1
OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

CERTIFICATE OF THE CLERK

I, RAY HARDY, District Clerk of Harris County, Texas, do hereby certify that the above and foregoing -25- pages in writing contain a complete full and correct transcript of the proceedings had at the August Term, A. D. 1968, of said Court, as shown by the papers on file and the records of my office, wherein Preston A. Tate was the Plaintiff, and Herman Short, Chief of Police of The City of Houston, Texas was the Defendant.

WITNESS my hand and seal of said Court at Houston, Texas, this 14th day of May, A. D., 1969.

RAY HARDY
District Clerk
Harris County, Texas

By: /s/ [Illegible]
Deputy

A True Copy
Attest:

GLENN HAYNES
Clerk
Court of Criminal Appeals of Texas

By: /s/ Tray Bennett
Deputy

[SEAL]

WRIT OF PROCEDENDO

THE STATE OF TEXAS
VS. No. 245832
Preston A. Tate

COUNTY CRIMINAL COURT
AT LAW No. 1 OF
HARRIS COUNTY, TEXAS

THE STATE OF TEXAS TO Municipal Court city of Houston Harris County, Texas

WHEREAS, In the case of the State of Texas vs. Preston A. Tate, No. 245832

appealed from your Court, the appeal of said Defendant was dismissed in the County Criminal Court at Law No. 1 of said County, on the 2 day of December A. D. 62

and a Writ of Procedendo ordered;

THEREFORE, You are hereby commanded that you proceed with the enforcement of the judgment rendered against him in your Court, the said appeal of the said Defendant to the contrary notwithstanding, that you receive and file the original papers in said cause sent herewith, and collect as well the costs of this Court, which are set forth below. Herein fail not under penalty of the law.

BILL OF COSTS

CLERK'S FEES			SHERIFF'S FEES	
Docketing Cause	15	00	Serving ____ Capias and Mileage	
Entering Judgment		50	Summoning 2 Witnesses and Mileage	2 00
Entering Complaint		10	Other Fees ~~Transcript~~	~~2 00~~
Writ of Procedendo		75	~~26 pages at 1.00 per page~~	~~26 00~~ 2 00 AR
Entering Appearance				
Issuing Capias			Clerk's Fees	41 00
Filing Papers				
Other Clerk Costs Transcript	26	00		
TOTAL	41	00 AR	TOTAL	43 00

OVERSIZE PAGE – SEE NEXT FRAME FOR REMAINDER OF PAGE

WHEREAS, In the case of the State of Texas No. 24832

appealed from your Court, the appeal of said Defendant was dismissed in the County Criminal Court at Law No. 1 of said County, on the 2 day of December A. D. 19 67;

and a Writ of Procedendo ordered;

THEREFORE, You are hereby commanded that you proceed with the enforcement of the judgment rendered against him in your Court, the said appeal of the said Defendant to the contrary notwithstanding, that you receive and file the original papers in said cause sent herewith, and collect as well the costs of this Court, which are set forth below. Herein fail not under penalty of the law.

BILL OF COSTS

CLERK'S FEES			SHERIFF'S FEES		
Docketing Cause	15	00	Serving ____ Capias and Mileage		
Entering Judgment			Summoning 2 Witnesses and Mileage	2	00
Entering Complaint			Other Fees ~~Transcript 26 pages at 1.00 per page~~	~~28 00~~ 2	00 AR
Writ of Procedendo					
Entering Appearances					
Issuing Capias			Clerk's Fees	~~11~~	00
Filing Papers					
Other Clerk Costs Transcript	26	00			
TOTAL	~~41~~	00 AR	TOTAL	43	00

TO CERTIFY ALL OF WHICH, Witness my hand and the Seal of said Court at Office in Houston, Texas, this the 2 day of December A. D. 19 67

Ray Hardy

~~R. J. LINDLEY~~

District Clerk, Harris County, Texas

By Debra Cook Deputy

NO. [redacted]

COUNTY CRIMINAL COURT

AT LAW No. 1

HARRIS COUNTY

GM – 14/630

JM – 53/439

THE STATE OF TEXAS

vs.

[redacted]

WRIT OF PROCEDENDO

Issued this 2nd day of

December A. D. 19[illegible]

R. J. LINDLEY
District Clerk, Harris County, Texas

By [redacted] Deputy.

CHATHAM & STERLING, HOUSTON

[redacted]

STATE OF TEXAS
COUNTY OF HARRIS

I, Ray Hardy, District Clerk of Harris County, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, to-wit: [redacted] as appears of record in my office.

Witness my official hand and seal of office, this December 10, 1920

RAY HARDY, DISTRICT CLERK
Harris County, Texas
By L. Davis Deputy

SUPREME COURT OF THE UNITED STATES

No. 1873 Misc., October Term, 1969

PRESTON A. TATE, PETITIONER

v.

HERMAN SHORT, Chief of Police, Houston, Texas

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1757 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 29, 1970

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 401428 124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 324

TION NOT PRINTED

PRESTON A. TATE,

SE NOT PRINTED

Petitioner,

v.

HERMAN SHORT, Chief of Police,
Houston, Texas,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

Norman Dorsen
New York University School of Law
Washington Square South
New York, N.Y. 10003

Peter Sanchez-Navarro, Jr.
708 Main Street
Houston, Texas 77002

Roy Lucas
The James Madison Constitutional Law Institute
26 West 9th Street
New York, N.Y. 10011

Attorneys for Petitioner

Of Counsel:
Stanley A. Bass
Douglas J. Kramer
R. Brock Shamberg

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 324

PRESTON A. TATE,

Petitioner,

v.

HERMAN SHORT, Chief of Police,
Houston, Texas,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 445 S.W.2d 210 (1969), and a copy of that opinion appears in the separately printed Appendix. (A. 5).* The opinion of the County Criminal Court at Law No. 1 of Harris County, Texas was not reported and a copy of that opinion appears in the Appendix. (A. 33).

*References to the separately printed Appendix will be noted as A. References to the appendix to this brief will be noted App.Br.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on July 16, 1969. A timely petition for rehearing was denied on October 22, 1969. On January 9, 1970, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to March 21, 1970. This Court granted a writ of certiorari in this case on June 28, 1970. On July 28, 1970, the Clerk of the Court granted an application for an extension of time to file the Petitioner's brief on the merits to September 1, 1970. Jurisdiction rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether imprisonment of an indigent for failure to make immediate payment of a fine, where imprisonment is not an authorized punishment for the substantive offense, denies him the equal protection of the laws and due process of law, as guaranteed by the Fourteenth Amendment?

2. Whether imprisonment of an indigent for failure to make immediate payment of a fine, without a hearing to determine the reasons for his nonpayment, denies him the equal protection of the laws and due process of law, as guaranteed by the Fourteenth Amendment?

3. Whether imprisonment of an indigent for failure to pay a fine, at a rate fixed by statute of one day in jail for each unpaid five dollars of fine, denies him due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

This case involves the following statutes of the State of Texas:

Code of Criminal Procedure:

Art. 4.14 Corporation court

The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, and arising within such corporate limits.

Art. 45.53 Discharged from jail

A defendant placed in jail on account of failure to pay the fine and costs can be discharged on habeas corpus by showing:

1. That he is too poor to pay the fine and costs; and

2. That he has remained in jail a sufficient length of time to satisfy the fine and costs, at the rate of $5 for each day.

But the defendant shall, in no case under this Article, be discharged until he has been imprisoned at least five days; and a justice of the peace may discharge the defendant upon his showing the same cause, by application to such justice; and when such application is granted, the justice shall note the same on his docket.

This case involves the following sections of the Code for the City of Houston, Texas:

Section 15-60: Commitment to Jail Until Fine Paid: Stay of Judgment:

Unless a judgment for fine by the corporation court is appealed from and an appeal bond approved and filed, it shall be the duty of the clerk to forthwith issue a commitment, directed to the chief of police, or, any policeman of the city, to commit the defendant to the city jail or city farm until the full

amount of the fine is paid, or until the defendant is discharged according to law; provided, for good cause shown, the judge of the corporation court, in his discretion, may order a stay of judgment for a period not to exceed thirty (30) days, in which event the defendant shall not be committed to the city jail or city farm until after the expiration of the time such judgment is held in abeyance.

Section 35-8: Credit Against Fine for Service in Jail or Municipal Prison Farm:

Each person committed to the county jail or to the municipal prison farm for non-payment of their fine arising out of his conviction of a misdemeanor in the corporation court shall receive a credit against such fine of five dollars ($5.00) for each day or fraction of a day that he has served.

STATEMENT

On August 7, 1968, Petitioner was found guilty, in the Corporation Court of Houston, Texas, of several traffic offenses. (A. 49). The Corporation Court is a court of limited jurisdiction which cannot hear and decide cases involving crimes for which imprisonment is an authorized punishment. Texas Code Crim. Proc. art. 4.14. Nor is it authorized to sentence anyone to prison for violating a substantive criminal law. The fines imposed upon Petitioner, when added to certain other fines imposed in 1966 and which remained unpaid, aggregated $425. (A. 49). In accordance with the provisions of article 45.53 of the Texas Code of Criminal Procedure and Section 15-60 of the Houston Code, when Petitioner was unable to make immediate payment, he was committed to the Houston Prison Farm in the custody of the Respondent, Herman Short, Houston Police Chief. (A. 49). At the rate of $5.00 per day, specified under both state and local law, he would be required to serve 85 days in jail in lieu of the fine.

Petitioner's incarceration was temporarily terminated on August 28, 1968, after 21 days in custody, when he was released on a $500 habeas corpus bond. At that time Petitioner had, and still has, 64 days to serve unless he makes payment of $320.

On August 20, 1968, Petitioner applied to the County Criminal Court at Law No. 1 of Harris County, Texas for a writ of habeas corpus. (A. 20). In his affidavit accompanying the application, Petitioner swore, "I am imprisoned, as a result of being unable to pay a fine . . . [in several] causes.

"Because I am too poor, I am, therefore, unable to pay the accumulated fine of $425.00 . . . .

"And I cannot elect to satisfy the fine by payment of same as a result of my poverty.

"Because of my imprisonment, my ability to gain a livlihood [sic] is fundamentally and seriously impaired." (A. 22).

The State did not deny these allegations. Moreover, at the hearing on the application, the State stipulated that Petitioner "is poverty stricken, and that his whole family has been for all periods of time therein [sic], and probably always will be." (App. Br. 7a). Petitioner's uncontradicted testimony at the hearing was that, prior to arrest, he was employed and earned between twenty-five and sixty dollars a week. (App. Br. 3a). This was augmented by a monthly pension check from the Veterans Administration of one hundred and four dollars. (App. Br. 3a). Petitioner has a wife and two children dependent on him for support. (App. Br. 2a-3a). He desired his freedom so he could obtain a job and thereby be able to pay off his fine. (App. Br. 6a).

Petitioner testified that he informed the judge who presided over his 1968 trial for the traffic violations of his indigency. (App. Br. 6a). In regard to his 1966 conviction and fines, Petitioner testified, without contradiction or

impeachment, that he was relying on his attorney to prosecute an appeal (App. Br. 4a-5a) and for that purpose had given the attorney his trailer plus some cash. (App. Br. 5a). The attorney, who was subsequently disbarred for other reasons (App. Br. 7a-8a), apparently failed to perfect the appeal.[1] There is nothing in the record to indicate that Petitioner was aware or should have been aware that the 1966 judgment had become final.

The County Criminal Court denied Petitioner's application for a writ of habeas corpus. The Court of Criminal Appeals affirmed. It "overrule[d] appellant's contention that because he is too poor to pay the fines his imprisonment is unconstitutional." 445 S.W.2d 210 (1969) (A. 5). It is this judgment from which a petition for certiorari was filed in this case.

ARGUMENT

I. Under Williams v. Illinois, 90 S. Ct. 2018 (1970), Imprisonment of an Indigent for Failure To Make Immediate Payment of a Fine, Where Imprisonment Is Not an Authorized Punishment for the Substantive Offense, Denies Him the Equal Protection of the Laws.

This case is squarely governed by the recent decision in *Williams v. Illinois*, in which the Court held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." 90 S.Ct. at 2023-24 (footnote omitted). The decision rested on the constitutional command, well established since *Griffin v. Illinois*, 351 U.S.

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[1] This is normally accomplished by posting an appeal bond within 10 days. Texas Code Crim. Proc. arts. 44.14, 44.16.

12 (1956),[2] "to alleviate discrimination against those who are unable to meet the costs of litigation in the administration of criminal justice." *Williams v. Illinois*, 90 S.Ct. at 2022.

The same considerations apply here. The Corporation Court of Houston, in which Petitioner was convicted, has no jurisdiction to hear cases in which imprisonment is an authorized punishment and thus has no jurisdiction to impose a jail sentence. Texas Code Crim. Proc. art. 4.14. Accordingly, the "statutory ceiling placed on imprisonment for [the] substantive offense" in this case is zero days. Even though Petitioner, unlike Williams, was not sentenced to prison *and* a fine,[3] in effect Petitioner was given the maximum prison term authorized by the Texas legislature. It is therefore a violation of equal protection to impose a jail sentence on the Petitioner because to do so imprisons him beyond the maximum term that is authorized under the laws of Texas.

Despite the fact that the Texas statute seems to apply equally to all in the sense that all persons fined are given a chance to satisfy the money judgment imposed against them, this is a specious form of equality as far as paupers are concerned. As Chief Justice Burger pointed out in the *Williams* case:

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[2]See also *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959).

[3]Petitioner here, like the appellant in *Williams*, was not given an "alternative sentence,"–e.g., "thirty days or thirty dollars." In other words, this is not a case in which a judge, within his broad sentencing discretion, decided that the appropriate punishment for the particular defendant before him was either a fine or what the judge has determined, with due regard for the particular circumstances of the individual defendant, to be an "equivalent" jail term. This is not such a case because (1) the judge made no such determination, and (2) he could not legally have done so, since imprisonment is not authorized by statute for these offenses.

> Since only a convicted person with access to funds can avoid the increased imprisonment the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment. 90 S.Ct. at 2023 (footnote omitted).

It might be argued that this case is distinguishable from *Williams* because a defendant who is sentenced to a fine *and* imprisonment is assured of *some* punishment even if he is financially unable to pay the fine, while a defendant convicted under a statute for which no jail sentence could be imposed will escape punishment. But this argument misreads both the *Williams* decision and Petitioner's contention here. As the Court pointed out in *Williams*, there are "numerous alternatives" to which the State may resort to enforce its judgment against those not immediately able to pay. 90 S.Ct. at 2024. "The State is not powerless to enforce judgments against those financially unable to pay a fine. . . ." *Id.*

The most promising alternative is to allow a defendant to pay off a fine in installments. This procedure, which is used in several states,[4] has been widely endorsed[5] and has

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[4]E.g., Cal. Pen. Code § 1205 (West 1956) (misdemeanors); Del. Code Ann. tit. 11 § 4332(c) (Supp. 1968); Md. Ann. Code art. 38 § 4(a)(2) as amended by ch. 147 of the Laws of Maryland, 1970; Mass. Ann. Laws ch. 279 § 1A (1968) (probation); N.Y. Code Crim. Proc. § 470-d(1)(b) (McKinney Supp. 1969); Pa. Stat. Ann. tit. 19 § 953-56 (1964); Wash. Rev. Code Ann. § 9.92.070 (1961). These alternatives, where available, are discretionary.

[5]National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code § 3302(4) (1970); ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and

been highly successful in practice.[6] A large percentage of those given the chance are able to pay off the fine and avoid jail, sometimes with the assistance of garnishment procedures. In addition, because much of the prison population is held due to an inability to pay a fine,[7] a state stands to gain a considerable saving by using the installment plan—it saves the expense of maintaining a prisoner,[8] it often collects the fine,[9] and in many cases it avoids the necessity of supporting the defendant's family under the state welfare program.[10]

Procedures § 2.7(b) (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 18 (1967); Model Penal Code § 302.1(1) (Proposed Official Draft 1962). See also Comment, 1966 U. Ill. L.F. 460; Note, 64 Mich. L. Rev. 938 (1966); Note, 50 Minn. L. Rev. 1152 (1966); Note, 22 Vand. L. Rev. 611 (1969).

[6]Sellin, Recent Penal Legislation in Sweden 14 (1947); Binford, Installment Collection of Fines by a County Court, Proc. Cong. Amer. Prison Assoc. 361 (1937); Cordes, Fines and Their Enforcement, 2 J. Crim. Sci. 46 (Radzinowicz & Turner ed. 1950); all cited in Notes, Fines and Fining—An Evaluation, 101 U. Pa. L. Rev. 1013, 1022-23 (1953).

[7]ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures 119-20 (Approved Draft 1968); A.L.I. Model Penal Code, Comment to § 7.02 (Tent. Draft No. 2, 1954); President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report: The Courts 18 (1967).

[8]President's Comm'n on Law Enforcement, Task Force Report: The Courts 15 (1967); S. Rubin, H. Weihofen, A. Edwards & S. Rosenzweig, The Law of Criminal Correction 253 & n.154 (1963).

[9]See authorities cited in note 6 *supra*.

[10]See ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures 120-21 (Approved Draft 1968); President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report; The Courts 15 (1967); E. Sutherland & D. Cressey, Principles of Criminology 276 (6th ed. 1960); Binford, Installment Collection of Fines by a County Court, Proc. Cong. Amer. Prison Ass'n 361, 366 (1937).

Under other alternatives to the present system, a State might assist the defendant in finding employment or put him to work for the state, or, as the Court noted in *Williams*, impose a parole requirement that an impoverished defendant do specified work during the day to satisfy a fine. 90 S.Ct. at 2024 n. 21. The key point is that reasonable and empirically tested alternatives are available, which individual states may tailor to their own preference. What states may *not* do is what Texas did here—automatically incarcerate around the clock an individual who is not able to pay a fine.

A requirement that states pursue reasonable alternatives to the procedure employed here is fully consistent with the long line of decisions in this Court holding that "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Discriminations on the basis of wealth are subject to "the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Loving v. Virginia*, 388 U.S. 1, 9 (1967). See also *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969) (Equal Protection Clause requires "a careful examination on our part . . . where lines are drawn on the basis of wealth or race. . . .").

For states to pursue reasonable alternatives to the present abrupt procedure is also consistent with the many cases that require state laws infringing on constitutional interests, including personal liberty, to be drawn as narrowly as possible, even where the purposes of the state are legitimate and substantial. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969); *Johnson v. Avery*, 393 U.S. 483, 488-90 (1969); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-08 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Talley v. California*, 362 U.S. 60, 63 (1960); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

The *Shapiro, Johnson* and *Dean Milk* cases make it clear that this principle is not restricted to instances involving the First Amendment.

In maintaining that the state be required to pursue reasonable alternatives–which, as indicated in *Williams,* are available in several states[11]–Petitioner notes that this is not a case in which an individual is able to pay his fine, but wilfully refuses to do so. Nor is this a case in which a state has jailed an indigent "who, despite his own reasonable efforts and the State's attempt at accomodation, is unable to secure the necessary funds." *Morris v. Schoonfield,* 90 S.Ct. 2232, 2233 (1970) (White, J., concurring). There is no evidence in the record that Petitioner wilfully refused to pay; indeed his indigency was plain and conceded by the State. (App. Br. 7a). Still less is there any evidence that the State attempted to "accommodate" petitioner in any way to alleviate the discrimination that is inherent in the present statutory scheme.

Nor should Petitioner be prejudiced by non-payment of the fines levied against him in 1966; there is no evidence in the record indicating that he wilfully refused to pay them, or even was aware he had to pay. Petitioner relied upon his attorney to appeal those convictions, having given him a trailer and some cash for this purpose. (App. Br. 4a-5a). The attorney, who was subsequently disbarred for other reasons (App. Br. 7a-8a), failed to perfect the appeal, and this fact was unknown to Petitioner.[12]

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[11] See authorities cited in note 4 *supra.*

[12] Had the attorney perfected the appeal, Petitioner would have been under no obligation to pay the fine because he would have been entitled to a trial de novo in the county court, Code Crim. Proc. arts. 44.17, 45.10, and the judgment of the Corporation Court would have lacked finality. See *Deal v. State,* 423 S.W.3d 929, 931 (Tex. Crim. App. 1968); Houston Code § 15-60.

The conceivable justifications for incarcerating a defendant for failure to make an immediate, lump-sum payment of fines are plainly insufficient, both in principle and under the *Williams* decision itself. The traditional reason for jailing persons who do not pay is to coerce them into compliance. But it is obvious that if a person is simply unable to pay he cannot be coerced into doing so. To jail a person summarily for this purpose is plainly unconstitutional. See *Morris v. Schoonfield*, 301 F.Supp. 158, 163 (D. Md. 1969), vacated on other grounds, 90 S.Ct. 2232 (1970).

A second conceivable justification is administrative convenience. But this justification is also insufficient. "[T]he constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Williams*, 90 S.Ct. at 2024; see also *id.* at 2033 (Mr. Justice Harlan, concurring). Moreover, it is not more convenient to imprison persons who cannot pay fines than to allow such persons to pay on the installment plan. Each man in prison costs the state a large and growing amount.[13] At the same time, the fine goes uncollected, and, as pointed out above, persons dependent upon the jailed defendant often are forced to seek public assistance, at substantial cost to the public.

The National Commission on Reform of Federal Criminal Laws, in its Study Draft of a new Federal Criminal Code (1970), has endorsed a procedure similar to that urged by Petitioner. Characterizing existing provisions of Federal law (similar to many state laws) dealing with nonpayment of fines as "arbitrary" (Study Draft, Comment to § 3304), the Commission would limit imprisonment for failure to pay fines to cases of wilful refusal. "Imprisonment is therefore permitted only in the case where the defendant can pay (or could have paid) the fine, but will not pay it." 2 Working Papers of the National Commission of Reform of Federal Criminal Laws 1328 (1970). The

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[13]See authorities cited in note 8 *supra*.

Study Draft proposes that, when a fine is levied, "the court shall not impose at the same time an alternative sentence to be served in the event that the fine is not paid." Section 3302(5). If the defendant fails to pay the fine, or any installment, he may be required to show cause why he should not be imprisoned. Section 3304(1). If it appears that his default is excusable—i.e., that he made "a good faith effort to obtain the necessary funds for payment" or that he did not intentionally refuse to make the payment—the court cannot imprison him. See Section 3304(2), (3). Moreover, the court is empowered, where the default is excusable, to enter an order "allowing the defendant additional time for payment, reducing the amount of the fine or of each installment, or revoking the fine or the unpaid portion in whole or in part." Section 3304(3).[14]

In short, while a state has a legitimate interest in punishing those who violate the law, once it determines that a fine is the only punishment for a particular law violation, it cannot automatically imprison an individual who is unable to make immediate payment of the fine. To do so, as Texas has in this case, is inconsistent with the Equal Protection Clause of the fourteenth Amendment.

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[14]A similar statutory scheme is proposed in the Model Penal Code, §§ 302.1 to .3 (Proposed Official Draft 1962) and by the ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 6.5(b) (Approved Draft 1968). "[I]mprisonment of an offender who does not have the means to pay—barring the rare but not unknown case of the defendant who deliberately deprives himself of the means to pay—should not be tolerated." *Id.* at 288.

II. Imprisonment of an Indigent for Failure To Make Immediate Payment of a Fine, Where Imprisonment Is Not an Authorized Punishment for the Substantive Offense, Denies Him Due Process of Law.

This Court has recognized that state action that is "patently arbitrary" and "utterly lacking in rational justification" is barred by the Due Process Clause of the Fourteenth Amendment. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960). Moreover, "there are limits to the extent to which the presumption of constitutionality can be pressed" where a "basic liberty" is concerned. *Skinner v. Oklahoma*, 316 U.S. 535, 544 (1942). See also *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

The decision of Texas to imprison Petitioner for nonpayment of his fine is plainly invalid under the prevailing due process test. Although "A state has wide latitude in fixing the punishment for state crimes," *Williams v. Illinois*, 90 S.Ct. at 2022, once it has determined, as in this case, that a fine is the only appropriate punishment for an offense, "the administrative inconvenience in a judgment collection procedure does not, as a matter of due process, justify sending to jail or extending the jail term of individuals who possess no accumulated assets." *Williams v. Illinois*, 90 S.Ct. at 2034 (Harlan, J., concurring) (footnote omitted).

In *Williams*, Justice Harlan fully developed the reasons why the use of jail rather than an installment collection procedure or other alternative means of assuring payment of a fine is "utterly lacking rational justification." In the first place, the convenience of jailing persons unable to make immediate lump-sum payment is not a constitutionally sufficient justification. Second, it is "doubtful" that a legislature could rationally determine that only by lump-sum payment can a fine operate as an effective deterrent. Third, it is "most unlikely" that the legislature had made a "considered judgment" that it was "rational and necessary" that jail be the sole alternative to lump-sum payment. 90 S.Ct. at 2033-34.

In this case, where the State both by its substantive and jurisdictional law has clearly evinced a determination that Petitioner's traffic violations be punished by fine alone, his imprisonment for failure to make immediate payment suffers from precisely the due process defects that Justice Harlan found in *Williams*. First, the insufficiency of the justification based on convenience is the same as in *Williams*. Second, the requirement of immediate, lump-sum payment is no more rational than in *Williams*. Third, it seems clear here that the responsible legislative bodies did *not* determine that an immediate, lump-sum payment was necessary for the fine to have a deterrent effect. Apart from the absence of an affirmative expression to this effect, any suggestion of immediacy is negated by Section 15-60 of the Houston Code, which provides that the corporation court judge has the discretion to stay a judgment of that court for up to thirty days, and by Article 42.13 § 5(b)(8) (Supp. 1969) of the Texas Code of Criminal Procedure, which authorizes installment payments as a condition of probation, but which is inapplicable to cases within the jurisdiction of the corporation court.

Justice Harlan recognized in the *Williams* case that the fact that a State imposed a fine alone rather than a fine plus a prison term should have no bearing on the constitutional judgment under the Due Process Clause. He said:

> [N]o distinction [should be made] between circumstances where the State through its judicial agent determines that effective punishment requires less than the maximum prison term plus a fine, *or a fine alone*, and the circumstances of . . . [the Williams] case." 90 S.Ct. at 2034 (footnote) (emphasis added).

Furthermore, the circumstance that the determination was made here by the State Legislature rather than its "judicial agent" underlines the irrationality of imprisonment in this case. Where a judge has no discretion to impose a prison sentence for a violation of law, jailing for

nonpayment is all the more invalid under the standards of the Due Process Clause.[15]

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[15]A separate denial of due process in this case is the equation (under Section 35-8 of the Houston City Code and Texas Code Crim. Proc. art. 45.53) of one day in jail for each five dollars of fine. This is a patently unreasonable and arbitrary basis for determining the length of Petitioner's incarceration. States have set different figures for converting dollars of fines into days of imprisonment. See Note, Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days," 57 Calif. L. Rev. 778, 779 n.3 (1969). Although five dollars per day appears to be close to the median, it is nevertheless unreasonable.

The deplorable conditions in prisons, and the inconvenience, humiliation, and stigma that accompany "doing time" in jail, are well known. Would any person possessing financial means choose to spend ten days in jail in lieu of a $50 fine? Clearly not. Professor Kent Greenawalt has suggested that ten dollars a day is the *minimum* "civilized" rate of conversion, and that even that rate should not be enforced "unless there were evidence that the relevant legislative body or trial judge had adverted to the problem of fairness." Greenawalt, Constitutional Law, 1966 Survey of New York Law, 18 Syr. L. Rev. 180, 197 & n.109 (1967). See also *Strattman v. Studt*, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969) (rate of three dollars per day unreasonable under the Fourteenth Amendment).

This conclusion is consistent with the even stronger conclusion of the American Bar Association that "The exclusive use of a dollar-day ratio both presents the possibility of a brutally long sentence and provides as a measure an arbitrary figure which makes no economic sense and which bears no relation to the factors which ought to govern a choice as to the length of a sentence." ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures 292 (Approved Draft 1968); compare *United States ex rel. Privitera v. Kross*, 239 F.Supp. 118 (S.D.N.Y.), aff'd mem., 345 F.2d 533 (2nd Cir.), cert. denied, 382 U.S. 911 (1965) (sentencing judge exercised discretion to impose a jail sentence that was, in his judgment, equivalent to the fine imposed).

III. Imprisonment of an Indigent for Failure To Make Immediate Payment of a Fine, Without a Hearing To Determine the Reasons for Nonpayment, Denies Him Due Process of Law and the Equal Protection of the Laws.

In *Specht v. Patterson*, 386 U.S. 605 (1967), the Court unanimously held that the Due Process Clause required Colorado to hold a hearing with appropriate procedural safeguards before it could invoke its Sex Offenders Act, which becomes operative when a person convicted of specified sex offenses "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." *Id.* at 607. The Court recognized that "the invocation of the . . . Act means the making of a new charge leading to criminal punishment." *Id.* at 610.

The philosophy underlying the *Specht* decision is applicable to the case at hand. Here, too, there is a "new charge" that can lead to "criminal punishment." The charge, of course, is failure to pay the fine levied on the Petitioner, and the criminal punishment is the jail sentence which Petitioner summarily received upon his failure to make the payment. As in *Specht*, the State should not be able to take this action without satisfying the requirements of due process under the Fourteenth Amendment.

A hearing is also required by the Equal Protection Clause. "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). "The Equal Protection Clause . . . imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966). Yet a statute requiring commitment for failure to pay a fine is irrationally overbroad in that it lumps together persons unable to pay the fine with persons who, although able, wilfully refuse to pay.

Accordingly, under both due process and equal protection standards a hearing is required to ascertain whether a defendant's nonpayment amounts to a wilful refusal, in which case confinement is appropriate, or instead was caused by his inability to pay, in which case immediate confinement should not be permitted.

A three judge district court unanimously reached this conclusion in *Morris v. Schoonfield*, 301 F.Supp. 158 (D. Md. 1969), vacated on other grounds, 90 S.Ct. 2232 (1970). The district court said:

> We are satisfied that Article 38, sections 1 and 4 *cannot be applied constitutionally* to an indigent defendant unless he is given an opportunity to tell the judge that he is financially unable to pay the fine before he is committed for nonpayment, so that the judge may take that factor into account. 301 F.Supp. at 163 (emphasis added).[16]

A recent authoritative report of The National Commission on Reform of Federal Criminal Laws (1970) reached the same conclusion. The Commission's Study Draft provides that if there is default in the payment of a fine a show cause hearing should be held to determine whether the defendant could be imprisoned—either because of "an intentional refusal" to pay or a "failure on his part to make a good faith effort to obtain the necessary funds for payment." Section 3304. The Comment to this section states:

> The proposed approach . . . is to require a separate proceeding to determine whether there was such culpability for the nonpayment as to warrant a prison sanction in the first place, and to grant such power to the court as to permit flexibility in treatment of the nonpayer . . . .

The above authorities underscore the conclusion that the factual determination involved here is of critical importance

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[16]The three judge court explicitly rested its decision on both the Due Process and Equal Protection Clauses. 301 F.Supp. at 163.

to the indigent defendant. In other circumstances where liberty was involved this Court has required a hearing measuring up to the standards of due process. E.g., *In re Gault*, 387 U.S. 1 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966). A hearing has also been required in a variety of cases in which other important interests were at issue. E.g., *Goldberg v. Kelly*, 90 S.Ct. 1011 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). As Mr. Justice Frankfurter said, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951): The extent to which due process must be afforded is influenced by the extent to which an individual may be "condemned to suffer grievous loss." The loss of personal liberty is surely sufficiently "grievous" to require the application of due process standards, and it is therefore imperative that the State hold a hearing before imprisoning Petitioner and other indigents for failure to pay a fine.[17] The failure to do so here violated the Fourteenth Amendment.

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[17]A recent comprehensive analysis reached the same conclusion: "Since the offender's liberty may be at stake, he should have opportunity to present testimony in his behalf . . . ." Note, Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days," 57 Calif. L. Rev. 778, 820 (1969). See also Note, Fines and Fining–An Evaluation, 101 U. Pa. L. Rev. 1013, 1024 (1953).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

NORMAN DORSEN
New York University School of Law
Washington Square South
New York, N.Y. 10003

PETER SANCHEZ-NAVARRO, JR.
708 Main Street
Houston, Texas 77002

ROY LUCAS
The James Madison Constitutional
Law Institute
26 West 9th Street
New York, N.Y. 10011

Attorneys for Petitioner

Of Counsel:

STANLEY A. BASS
DOUGLAS J. KRAMER
R. BROCK SHAMBERG

August, 1970

APPENDIX TO THE BRIEF

No. 245,832

EX PARTE:	IN THE COUNTY CRIMINAL COURT AT LAW NO. 1 OF
PRESTON A. TATE	HARRIS COUNTY, TEXAS

STATEMENT OF FACTS ON WRIT OF HABEAS CORPUS HEARING

[1] BE IT REMEMBERED that upon the 30th day of August, A.D., 1968, the above entitled and numbered cause came on for hearing before the HONORABLE LEE DUGGAN, JR., JUDGE of County Criminal Court at Law No. 1 of Harris County, Texas, and both the Defendant and the State of Texas appearing in person and by Counsel, the following proceedings were had:

APPEARANCES:

FOR THE STATE OF TEXAS:	Mr. Joe Moss Mr. Don Lambright Assistant District Attorneys Criminal Courts Building Houston, Texas 77002
FOR THE RELATOR:	Mr. Peter S. Navarro, Jr. Attorney at Law 6731 Harrisburg Street Houston, Texas 77011

* * *

[10] MR. PRESTON TATE, called as a witness, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. NAVARRO:

Q. Would you state your name to the Court, please, sir? A. Preston Armour Tate.

Q. Where do you reside, Mr. Tate? A. 6205½ Sherman, Houston, Texas.

Q. Is that in Houston, Harris County, Texas? A. Yes, sir.

Q. How long have you been residing in this City? A. Approximately 20 years.

Q. Are you married, Mr. Tate? A. Yes, sir.

Q. And, what is the name of your wife? A. Ada Ruth Tate.

Q. Do you have any children? A. Yes, sir.

Q. Are those children's names Robert Tate and David Keith Tate? A. Yes, sir.

Q. Are both of them living with you when you are at home? [11] A. Yes, sir.

Q. Is Robert age two? A. Yes, sir.

Q. And, is David Keith eight weeks old? A. Yes, sir.

Q. Are you employed at the present time, Mr. Tate? A. Yes. I had a job the day I was arrested.

Q. That was not my question. Are you employed at the present time? A. No, sir.

Q. Were you employed on or about August 7, 1968, on the date that you were arrested? A. Yes, sir.

Q. Who were you employed with? A. I was working with Royal Homes as a grouper.

Q. And, previous to August 7, 1968, how long had you been employed with that company? A. Some few weeks.

Q. Previous to that employment, what kind of work did you do? A. I worked for a service station two days.

Q. And, previous to that time? A. I owned my own place of business.

Q. What kind of business was that? A. A repair shop for motorcycles and cars.

[12] Q. You did general repair work in your neighborhood, is that your testimony? A. Yes, sir.

Q. Does your wife work? A. Not at present.

Q. Was she working on or about August 7, 1968? A. No, sir.

Q. Has she ever worked during your marriage? A. Yes, sir. She has worked a lot.

Q. Now then, on the date you were arrested, what were your earnings on a weekly basis, Mr. Tate? A. Approximately twenty-five to about sixty a week.

Q. And, with that money that you earned, did you pay rent, buy groceries, pay utilities and support your family? A. Pay rent and buy groceries. The utilities are usually furnished.

Q. Do you receive any compensation from the Veteran's Administration as a result of disability you received at one time? A. Yes, sir.

Q. And, how much is that a month? A. It has been $104.00 a month for a few months.

Q. Previous to the few months, how much was it? A. None. None.

[13] Q. How much? A. None, sir.

Q. You just commenced—within the past—within a period of the last two or three months you commenced receiving Veteran's Administration disability payments? A. Yes, sir.

Q. Now, combining what you get from the Veteran's Administration and what you receive from working during the week, you support and maintain your family. Is that your testimony? A. Yes, sir.

* * *

[15] Q. Did you ever find out during the time you were in prison that you could get out of jail and by what means? A. The only—only by telling that it happened as I remembered in the past since the tickets were issued me about May or June of 1966.

Q. But, were you ever told you could get out of jail by paying fines? A. No, sir, I was not.

Q. You weren't told by anyone at the Police Station? A. No, sir.

Q. Were you told by the Judge that heard your cases? A. The Judge did not say.

Q. In other words, you did not know you could get out of jail by paying these fines off? A. I did not.

Q. You did not? A. I did not. I was not told how much I had been convicted for or committed to pay.

[16] Q. You did not know, or did you know how much money you were fined totalled? A. Three hundred fifty dollars and then the other seventy-five dollars that had been prior to that.

Q. And, what else? A. That was all they declared. Not anything else was said.

* * *

Q. Tell the Court what you understand Capias to mean? A. Capias Pro Fine, as I understand it, is a fine or a series of fines that's been imposed by the Trial Judge on the one found guilty, and you're supposed to pay them.

Q. You're given a certain amount of time to pay, isn't that right? A. I suppose. I wasn't given any certain time to pay it.

Q. Do you recall those two allegations of running [17] a red light, dated May 27, 1966? A. I do.

Q. Did you appear before Judge Guinn? A. I did.

Q. Do you remember that pretty well? A. Yes, sir.

Q. Were you represented at that time by an attorney? A. I was.

Q. And, were several fines imposed at that time? A. There were two imposed at that time.

Q. Did you want your attorney to appeal those cases? A. Yes, sir. I asked that they be appealed. I asked the Attorney to appeal those cases, and I was relying on him to appeal them.

Q. Did you pay for that appeal? A. I did.

Q. Was it your understanding that you had paid for that appeal? A. Sir?

Q. Was it your understanding that you had paid for that appeal? A. I did.

Q. All right, and is that the reason you didn't [18] know more about these two tickets? Is that correct? A. I had no reason to do anything about them, as I had an attorney representing me.

Q. How about these other tickets, the two No Texas Operator's License, and the other, the running a stop sign and this expired license plates. Did you incur those this year? A. I didn't get any this year.

Q. What about the other tickets, other than these ones? A. They were simultaneously, in the middle of 1966.

Q. What about the other ones? A. They were back in 1966.

Q. Then, these are real old tickets? A. Yes, sir.

Q. Why didn't you pay them or go to Court on them, Mr. Tate? A. I had been before the Court. I had asked this attorney to represent me, and the attorney had been paid to represent me. I paid him cash out of my pocket, and eleven hundred dollars worth of goods in a trailer.

Q. You gave him cash and other items? A. I gave him eleven hundred dollars worth value [19] in the trailer to represent me. He first wanted to take the car, but then he said he would represent me.

* * *

[20] Q. You were in jail now, on August 7th. How many appearances did you make before the Court with relation to these tickets that we are talking about? A. Six.

Q. You made six appearances in Court? A. Yes, sir.

Q. Did they involve the same traffic ticket, or did they involve different ones? A. The same group of traffic tickets.

Q. Why did you appear six times in Court? A. I plead "Not Guilty."

[21] Q. Were these appearances in Court before the same Judge, the Honorable Raymond Judice? A. Yes, sir, Judge Judice.

* * *

[22] Q. Did he ever advise you that you could have a lawyer or should have a lawyer, or to get one? A. He threatened me with Court action and Court postponement about three or four times, to see if he could locate the policeman that issued these citations.

Q. Did you feel you needed a matter of time? A. I explained to the Judge what I thought had happened.

[23] Q. On each occasion you appeared before the Judge—or the City Recorder, did you try to explain to the Judge you didn't have any money, and that you couldn't pay these fines, after finding out it was going to cost you four hundred twenty-five dollars? A. I did.

Q. Did he ever discuss with you any of these tickets or if you were able to pay them on any of those six occasions that you appeared? A. He did not.

Q. He did not, on any of the six occasions you appeared? A. I explained I had an attorney on two capiases, or two of the tickets, and I thought he—he told me they were going to come up sometime. This attorney represented me, and that I had not jumped bond as such.

* * *

[24] Q. And, you could get out of jail by paying four hundred twenty-five dollars. A. He never said if I had four hundred twenty-five dollars I could get out of jail.

* * *

Q. And, you appeared in Court at least six times? A. Yes, sir.

Q. Without an attorney? A. Yes, sir.

Q. What happened then? A. The fine was the same.

* * *

[26] Q. Are you able to raise three hundred twenty-five dollars today? A. No, sir, I am not.

Q. Can you tell the Judge presiding here in this [27] Court when you could raise three hundred twenty dollars? A. I would like to go out and try to get a job—my job back, if the company can still use me, and try to pay it.

* * *

Q. [Interrupting] You live in an area of town that's called, I imagine East End of Houston, is that right? A. Yes, sir.

Q. In the East End area, is a—is there an agency that was founded and supported by charity, primarily by the United Fund? A. Yes, sir.

Q. Do they give any assistance to your family, as far as you know? A. About 80 or 90 percent of what keeps us alive and a roof over our head.

MR. MOSS: All this testimony about all of this poverty is material, but I think in this case it's gone far enough. The State stipulates he is poverty stricken. Let's get [28] on with it.

THE COURT: Is that so stipulated?

MR. NAVARRO: And, also, that her testimony will be the same.

MR. MOSS: Yes, sir, We stipulate she is poverty stricken, also.

MR. NAVARRO: And has been assisted by—

MR. MOSS: She is poverty stricken, period.

MR. NAVARRO: We have a welfare worker from the neighborhood center here to further support the testimony of Mr. Tate as to the assistance his family has been given.

MR. MOSS: We would stipulate he is poverty stricken, and that his whole family has been for all periods of time therein, and probably always will be.

* * *

[30] MR. MOSS: Well, we'll call Mr. Tate to the stand, then.

[31] MR. PRESTON TATE, called to the Witness Stand by The State of Texas, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. MOSS:

* * *

Q. On any of these cases you testified about, were you tried before a jury? A. On the red light and no driver's license capias pro fine I was.

* * *

Q. Who was your lawyer? A. John W. L. Hicks. He has now been since disbarred.

[32] Q. When was he disbarred? A. I haven't been notified by the Bar Association, nor have I been able to obtain a release from him of my files or a reimbursement.

* * *

[34] Q. So, you testified from what Mr. Hicks told you, rather than what was personally told you? A. I went to his home yesterday evening. He's an old man, and he doesn't talk much.

Q. As little as he talks, he did tell you what went on in the Courts on these several cases you testified about? A. That's when I sought legal help to find someone to represent me.

* * *

NO. 324

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

* * *

PRESTON A. TATE,

Petitioner

v.

HERMAN SHORT, Chief of Police, Houston, Texas,

Respondent

* * *

On Writ of Certiorari to the Court of Criminal Appeals of Texas

* * *

BRIEF FOR RESPONDENT

* * *

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711

WILLIAM OLSON
City Attorney
City Hall
Houston, Texas

JOSEPH G. ROLLINS
Senior Assistant
City Attorney
Houston, Texas

Attorneys for Respondent

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NO. 324

* * *

IN THE

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Respondent

* * *

On Writ of Certiorari to the Court of Criminal Appeals of Texas

* * *

BRIEF FOR RESPONDENT

* * *

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 485 S.W.2d 210 (1969), and a copy of that opinion appears in the Appendix at page 5. The opinion of the County Criminal Court at Law No. 1 of Harris County, Texas, is not reported, and a copy of that opinion appears in the Appendix. (A. 33).

JURISDICTION

The jurisdiction of this Court to review by writ of certiorari the judgment of the Court of Criminal Ap-

peals of Texas is conferred by 28 U.S.C. §1257(3). Certiorari was granted on June 29, 1970. It is questioned by the Respondent that any substantial federal question is presented for adjudication by the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment to the United States Constitution:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 4.14, Texas Code of Criminal Procedure, provides as follows:

> "Art. 4.14 [62], [108], [98], Corporation Court.
>
> "The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which punishment is by fine only, and where

the maximum of such fine may not exceed two hundred dollars, and arising within such corporate limits."

Texas, Vernon's Ann. Code Crim. Procedure, Art. 45.06:

> The governing body of each incorporated city, town or village shall by ordinance prescribe such rules, not inconsistent with any law of this State, as may be proper to enforce, by execution against the property of the defendant, or imprisonment of the defendant, the collection of all fines imposed by such court ....

Article 43.09, Texas Code of Criminal Procedure, provides as follows:

> "Art. 43.09 [793] [878] [856] Fine discharged.
>
> "When a defendant is convicted of a misdemeanor and his punishment is assessed at a pecuniary fine, if he is unable to pay the fine and costs adjudged against him, he may for such time as will satisfy the judgment be put to work in the workhouse, or on the county farm, or public improvements of the county, as provided in the succeeding Article; or if there be no such workhouse, farm or improvements, he shall be imprisoned in jail for a sufficient length of time to discharge the full amount of fine and costs adjudged against him; rating such labor or imprisonment at five dollars for each day thereof; provided, however, that the defendant may pay the pecuniary fine assessed against him at any time while he is serving at work in the workhouse, or on the county farm, or on the public improvements of the county, or while he is serving his jail sentence, and in such instances he shall be entitled to a credit of five dollars for each day or fraction of a day that he has served and he shall only be required to pay

his balance of the pecuniary fine assessed against him. Acts 1965, 59th Leg. vol. 2, p. 317, ch. 722."

The following sections of the Code for the City of Houston, Texas, are also involved:

Section 15-60: Commitment to Jail Until Fine Paid: Stay of Judgment:

Unless a judgment for fine by the corporation court is appealed from and an appeal bond approved and filed, it shall be the duty of the clerk to forthwith issue a commitment, directed to the chief of police, or, any policeman of the city, to commit the defendant to the city jail or city farm until the full amount of the fine is paid, or until the defendant is discharged according to law; provided, for good cause shown, the judge of the corporation court, in his discretion, may order a stay of judgment for a period not to exceed thirty (30) days, in which event the defendant shall not be committed to the city jail or city farm until after the expiration of the time such judgment is held in abeyance.

Section 15-61: Remittance of Fine:

In all cases mentioned in section 15-60, where it appears from the facts and circumstances surrounding a particular case that justice has not been served, or that an unjust or excessive fine has been imposed in such case, the presiding judge of the corporation courts and the clerk of the corporation courts jointly may recommend, upon a form designated by the mayor for that purpose, that the fine imposed, or any part thereof, be remitted. Such recommendation shall state the name of the defendant, the offense upon which conviction was had, the amount of fine imposed therefor, the reasons for the recommendation, and such other information as the mayor shall from time to time designate or require, and the mayor may, in

his sole discretion, approve, modify or disapprove, such recommendation in whole or in part. The action of the mayor shall be transmitted to the clerk of the corporation courts to be entered upon the corporation court docket by the clerk and to the controller who shall authorize a refund of so much of the fine as the mayor, in his sole discretion, in each particular case, shall so designate.

Section 35-8: Credit Against Fine For Service in Jail or Municipal Prison Farm:

Each person committed to the county jail or to the municipal prison farm for non-payment of their fine arising out of his conviction of a misdemeanor in the corporation court shall receive a credit against such fine of five dollars ($5.00) for each day or fraction of a day that he has served.

QUESTIONS PRESENTED

I.

IF A PENAL LAW PROVIDES THAT A PERSON VIOLATING THE SAME SHALL BE PUNISHED BY A FINE, AND IF A PERSON CONVICTED OF VIOLATING SUCH LAW IS ASSESSED A FINE BUT REFUSES TO PAY IT, DOES THE CONSTITUTION OF THE UNITED STATES PROHIBIT THE IMPRISONMENT OF THAT PERSON FOR FAILURE TO PAY THE FINE?

II.

MAY THE PAYMENT OF A FINE ASSESSED AGAINST A PERSON FOR THE VIOLATION OF A PENAL LAW BE ENFORCED IF THE PAYMENT OF SUCH FINE WILL WORK A HARDSHIP UPON HIM? OR, AS A COROL-

LARY, DOES THE UNITED STATES CONSTITUTION PROHIBIT THE ASSESSMENT AND/OR COLLECTION OF A MONETARY FINE IF THE PERSON SO FINED WILL BE SUBJECTED TO A HARDSHIP THEREBY? IF SO, WHAT GUIDELINES MAY A COURT USE TO DETERMINE THE CONSTITUTIONALLY PERMISSIBLE DEGREE OF FINANCIAL INCONVENIENCE, IF ANY, TO WHICH A PERSON SO CONVICTED MAY BE SUBJECTED?

III.

IS THERE, IN EFFECT, AND BY WHATEVER TERM IT MAY BE MORE EUPHEMISTICALLY CALLED, A FEDERALLY PROTECTED "INDIGENCY EXEMPTION" FROM PENAL RESPONSIBILITY FOR THE VIOLATION OF LAWS WHERE A FINE ONLY IS IMPOSED FOR SUCH VIOLATION?

IV.

IF A SCOFFLAW ALSO QUALIFIES FOR A FEDERALLY PROTECTED "INDIGENCY EXEMPTION," IS HE NOT, IN EFFECT, GIVEN A *CARTE BLANCHE* TO VIOLATE ANY PENAL LAW PUNISHABLE BY FINE ONLY?

V.

IF THE SANCTION FOR VIOLATING A PENAL LAW IS BY FINE ONLY, AND IF A PERSON IS CONVICTED OF VIOLATING SUCH PENAL LAW AND IS ASSESSED A FINE AS A PUNISHMENT THEREFOR, DOES THE CONSTITUTION OF THE UNITED STATES REQUIRE

THE SENTENCING COURT TO ALLOW THE PAYMENT OF THE FINE BY INSTALLMENTS WHEN THE PERSON SO CONVICTED IS "INDIGENT"?

VI.

IF THE SANCTION FOR VIOLATING A PENAL LAW IS A FINE ONLY, AND IF A PERSON CONVICTED OF VIOLATING SUCH IS ASSESSED A FINE AS A PUNISHMENT THEREFOR, AND IF THE CONSTITUTION OF THE UNITED STATES DOES REQUIRE THE SENTENCING COURT TO ALLOW THE PAYMENT OF THE FINE BY INSTALLMENTS WHEN A PERSON CONVICTED OF THE VIOLATION THEREOF IS "INDIGENT," WHAT GUIDELINES MAY THE COURT FOLLOW TO DETERMINE:

A) WHAT IS "INDIGENCY" UNDER THE FEDERAL COURTS' CONSTRUCTION OF THE UNITED STATES CONSTITUTION, THE CONSTITUTION ITSELF (NOR ANY AMENDMENTS THERETO) NOT MENTIONING IT?

B) WHAT IS THE MONETARY AMOUNT OF SUCH INSTALLMENT, AND WHAT INTERVALS THEREOF, WILL BE CONSTITUTIONALLY PERMISSIBLE?

C) MAY A PERSON CONVICTED OF THE VIOLATION OF THE SAME LAW, AND ASSESSED A FINE THEREFOR, BUT WHOSE AFFLUENCE IS ABOVE THE FEDERALLY PROTECTED "INDIGENCY

LEVEL," ALSO PAY HIS FINE BY INSTALLMENTS SO THAT HE WILL NOT BE AS GREATLY INCONVENIENCED THEREBY?

VII.

IF THE CONSTITUTION OF A STATE EXPRESSLY PROHIBITS THE GARNISHMENT OF CURRENT WAGES, AND IF THE STATE EXEMPTION STATUTES EFFECTIVELY MAKE IT IMPOSSIBLE TO COLLECT A MONETARY JUDGMENT AGAINST A POOR PERSON,—DOES THE UNITED STATES CONSTITUTION RENDER THE STATE POWERLESS TO EXACT PUNISHMENT BY MEANS OF INCARCERATION OF A PERSON CONVICTED OF A CRIME AND ASSESSED A FINE AS A PUNISHMENT THEREFOR IF HIS DEGREE OF POVERTY QUALIFIES HIM FOR [FEDERAL] "INDIGENCY EXEMPTION" FROM INCARCERATION?

STATEMENT OF THE CASE

The Legislature of the State of Texas has determined, in the interest of traffic safety, that before being permitted to drive vehicles on the public highways, all persons, be they rich or poor, should be required to possess certain knowledge of the traffic laws as well as have the physical, audile, and visual ability necessary for the minimum acceptable driving skills. The Legislature has further provided that the possession of these skills and abilities should be evidenced by a driver's license. By this law, the rich, the poor, and those reflecting all the intermediate shadings of the

pecuniary spectrum, must pass the same test and meet the same physical standards in order to be entitled to have such a license issued to them. Furthermore, the Legislature has provided that no person, regardless of his wealth or lack thereof, shall drive a motor vehicle on the public ways of the State of Texas without such license.[1] The record here shows:

Petitioner, Preston Armour Tate, did operate a motor vehicle without a license, however, in defiance of the wish of the people of Texas as expressed by their duly elected legislature: He was given a citation and charged with driving without an operator's license on March 3, 1966, and on May 6, 1966, as a result of a jury trial in the Corporation Court of the City of Houston, Texas, he was found guilty and assessed a fine of $25.00. He has not paid that fine.

At 6:52 P.M. on May 6, 1966 (the same day the jury had found him guilty of the March 3 offense), Tate was again cited to appear on June 1, 1966, to answer another charge of driving without an operator's license. He failed to appear. After a capias was finally issued to compel his appearance he was tried on August 8, 1968, at which time he pled *nolo contendere* and was fined $50.00. He has not paid that fine.[2]

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[1]Art. 6687b, V.A.C.S.

[2]In his brief, Petitioner alleges, in re these 1966 convictions, that he gave his attorney a trailer and some cash to represent him. In the transcript of his habeas corpus hearing (Pgs. 16, 17, 18, Pg. 19, L1 1-3), Petitioner stated: "I paid him cash out of my pocket, and eleven hundred dollars worth of goods in a trailer" to represent him on those cases. Though it taxes credulity to understand why a man would pay over $1,100 to fight $75 worth of traffic tickets, if he were to be believed, it would cast a serious doubt as to his contention that he was unable to pay his fines. This could very well have influenced the County Criminal Court at Law not to grant the habeas corpus.

On May 7, 1966, he was again cited to appear on May 30, 1966, to answer for still another offense of driving without an operator's license. He failed to appear. After a capias was finally issued to compel his appearance, he was tried on August 7, 1968. He pled *nolo contendere* and was fined $50.00 for this offense. He has not paid that fine.

On May 14, 1966, he was cited to appear on June 10, 1966, to answer for still another offense of driving a vehicle without an operator's license. He did not appear. After a capias was finally issued to compel his appearance, he was tried on August 7, 1968. He pled *nolo contendere* and was fined $50.00. He has not paid that fine.

What is most pertinent, however, is that, at least until the time of the habeas corpus hearing on August 30, 1968, Tate has *never* obtained a driver's license. On his habeas corpus hearing he testified that his driver's license had expired on December 2, 1965, but did not quit driving until some six weeks before said hearing. Had he obeyed the law and not driven a motor vehicle without a license, he would not have been fined. *It was the operation of a motor vehicle in defiance of law, and not his poverty,* which has gotten him into the predicament about which he now complains.

Likewise, although at the present time Petitioner, Tate, alleges as a contributing factor to his poverty, that he has a wife and two children to support, at the time of his citations for driving without a operator's license, he had no children. Contrary to Tate's allegation of "immediate" imprisonment, in his case enough time has elapsed between the offense and the punish-

ment for two children to have been born unto his marriage.

Likewise, the Legislature of the State of Texas has enacted a uniform traffic code, one of the provisions of which requires a motorist entering an intersection at which a device known as a "traffic light" is installed, to stop when that light facing him is burning red.[3] Petitioner, Preston Armour Tate, violated this law, however, on March 3, 1966. He was cited to appear in court and the jury, on May 6, 1966, found him guilty of this offense and assessed a fine of $50.00. Tate has not yet paid this fine.

Under the aforementioned traffic code, the Legislature has further commanded that a motorist, upon entering an intersection faced with an official traffic control device containing the word, "stop," to so stop before entering said intersection.[4] On May 6, 1966, Petitioner, Tate, disobeyed this law and ran a stop sign. He was cited to appear and answer this charge on June 1, 1966, but failed to appear. After a capias was issued to compel his appearance, he pled *nolo contendere* to this charge on August 7, 1968, and was fined $50.00. He has not yet paid that fine.

Likewise, the Legislature of the State of Texas has, in the valid exercise of its police power enacted a statute requiring that all motor vehicles have current license plates attached to them and it has made a penal offense of the act of driving a vehicle without such license plates.[5] The penalty for the violation of the

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[3] Art. 6701d(33c), V.A.C.S.
[4] Art. 6701d(91), V.A.C.S.
[5] Art. 807b, V.A.P.C.

aforesaid law has been set at a fine not to exceed $200.00 to be levied against the miscreant.

Petitioner, Preston Armour Tate, violated this law on all three separate occasions, May 6, 1966, May 7, 1966, and May 14, 1966. He was caught driving a motor vehicle without current license plates and was cited to appear in Corporation Court on those offenses on June 1, 1966, May 30, 1966, and June 10, 1966. He failed to appear. After a capias was issued to compel his appearance, he appeared on August 7, 1968, pled *nolo contendere,* and was fined $50.00 for each of these offenses.

In an affidavit by Tate's wife, dated August 19, 1968,* as a grounds for her allegation that it would work a hardship upon that Tate family for him to be imprisoned and/or compelled to pay a fine, she stated that on the day of the affidavit, August 19, 1968, she and Petitioner had two children, the oldest of which was one year and eleven months of age. Thus, on the dates of the offenses, and on the dates Tate was cited to appear, there were no children.

OUTLINE OF THE ARGUMENT

I.

THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT A COURT FROM INCARCERATING A MISDEMEANANT FOR FAILURE TO PAY THE FINE ASSESSED AGAINST HIM UPON HIS CONVICTION OF THE MISDEMEANOR.

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*App. Pg. 23.

II.

IF A MISDEMEANANT FAILS TO PAY THE FINE ASSESSED AGAINST HIM UPON HIS CONVICTION OF THE MISDEMEANOR, THE UNITED STATES CONSTITUTION DOES NOT FORBID THE COURT WHICH TRIED AND CONVICTED HIM FROM INCARCERATING HIM FOR SUCH FAILURE, EVEN THOUGH THE STATUTE, UPON WHICH HIS CONVICTION WAS BASED, ONLY RECITED A MONETARY FINE AS THE SANCTION THEREOF.

III.

NO MORE THAN WEALTH SHOULD POVERTY PLACE A PERSON BEYOND THE SANCTIONS IMPOSED BY LAW.

IV.

A REQUIREMENT FOR ALL MISDEMEANOR COURTS TO SET UP CREDIT ARRANGEMENTS FOR MISDEMEANANTS SO AS TO ALLOW THEM TO PAY OUT THEIR FINES IN EASY INSTALLMENTS, WOULD RAISE INSURMOUNTABLE ADMINISTRATIVE AND JUDICIAL PROBLEMS, IMPOSING UNCONSCIONABLE BURDENS UPON SUCH INFERIOR COURTS.

V.

THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE A MISDEMEANOR COURT TO SET UP CREDIT ARRANGEMENTS FOR MISDEMEANANTS SO AS TO ALLOW THEM TO PAY OUT THEIR FINES IN EASY INSTALLMENTS.

BRIEF OF THE ARGUMENT

I.

THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT A COURT FROM INCARCERATING A MISDEMEANANT FOR FAILURE TO PAY THE FINE ASSESSED AGAINST HIM UPON HIS CONVICTION OF THE MISDEMEANOR.

All, or almost all, of the American jurisdictions have laws providing that a person may be imprisoned for failure to pay a fine,[7] and, the Congress of the United States has wisely given Federal Courts that power.[8] Texas, likewise, allows this sanction.[9] A minimal knowledge of human nature would be sufficient to convince one that there is the need of such a power on the part of the Courts, for, as the old truism says, "A law without a penalty for its violation, is mere advice."[10]

As Mr. Justice Cardozo so realistically put it in *Chapman v. Selover*:[11]

> "The state, when it punishes misdemeanors by fine, is not confined to the dubious remedy of a civil action for a penalty . . . The offender who

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[7]See collation of statutes, 90 S.Ct. 2025, et seq. as an appendix to *Williams v. Illinois*, 398 U.S. ——, 90 S.Ct. 2018 (U.S.Sup. 1970).

[8]18 U.S.C.A. #3565.

[9]Art. 45.53, V.A.C. C. P.

[10]For example, Art. 4640, V.A.C.S., prohibited either party to a divorce granted on the grounds of cruel treatment to remarry (except to each other) within one year of the date the divorce was granted. No sanctions were imposed, however, and many, many, persons disregarded it.

[11]225 N.Y. 417, 122 N.E. 206 (N.Y.Ct. App. 1919).

refuses to pay may be imprisoned until the fine is satisfied . . ."

Chief Justice Monroe of the Supreme Court of Louisiana, by use of a very colorful Pauline figure of speech, "articulated" the basic problem to be met and solved:

> "Probably the vast majority of offenders against the criminal laws are without visible assets through which the fines imposed upon them could be collected, and, if no means were provided for enforcing their collection, the sentence to pay a fine would be, in their ears, but as the tinkling cymbal and sounding brass.'"[11]

It is submitted, therefore, that there can be no bona fide quarrel with the general proposition that a court may imprison a person who refuses to pay a fine.

II.

IF A MISDEMEANANT FAILS TO PAY THE FINE ASSESSED AGAINST HIM UPON HIS CONVICTION OF THE MISDEMEANOR, THE UNITED STATES CONSTITUTION DOES NOT FORBID THE COURT WHICH TRIED AND CONVICTED HIM FROM INCARCERATING HIM FOR SUCH FAILURE, EVEN THOUGH THE STATUTE, UPON WHICH HIS CONVICTION WAS BASED, ONLY RECITED A MONETARY FINE AS THE SANCTION THEREOF.

The statutes petitioner violated provided for monetary fines only. Art. V., #19, of the Constitution of the State of Texas limits the criminal jurisdiction of

[11]State v. Abraham, 139 La. 466, 71 So. 769 (La. Sup. 1916).

justice of the peace courts"[11] to those cases where the penalty or fine is not more than $200. Petitioner was assessed those fines and was jailed for his failure to pay them. It is now argued by Petitioner's counsel that in some manner due process has been side-stepped and the Texas Constitution has been circumvented because of incarceration under these circumstances.

As early as 1876, in *Tuttle v. The State*,[12] it was held that this provision was not to be given a construction "interfering in any manner with the authority of such courts to imprison for non-payment of fine or costs . . ."

In *Dixon v. State*,[13] the Supreme Court of Texas held:

> "The fine and costs imposed for offenses are not so properly the principal as an incident—not the end, but a means of enforcing obedience to the laws. In the formation of the organic law, it cannot have been intended that the convicted culprit shall go wholly acquitted of punishment, because a pecuniary liability may have arisen as an incident to, or as a means of enforcing a punishment annexed to his offense.
>
> "The object of the imprisonment authorized by section 47 is not so much to enforce payment, as to insure punishment; and without it a numerous class of the worse offenders, those whose offenses are most pernicious and demoralizing to society, would be licensed to violate the law, and would set them at defiance with impunity." (2 Tex. 483).

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[11]In this instance, the Corporation Court of the City of Houston has concurrent jurisdiction with the Justice of the Peace Court, and can be considered as such. Art. 4.14, V.A.C.C.P.

[12]1 Tex. Ct. App. Rep. 365 (Tex. Ct. App. 1876).

[13]2 Tex. 481 (Tex. Sup. 1847).

It has ever been thus in Texas, and it would expand this brief to unnecessary length and thickness to recite the Texas cases following this doctrine. Anyway, as the interpretation of a local or state law by the highest Court of the State is binding upon federal courts unless in contravention of the Constitution of the United States or of some federal statue, *Lundy v. Michigan State Prison Board,*[11] the crucial question now before this Court is not whether such a policy violates Texas law, but, rather, whether Texas law, itself, contravenes the United States Constitution or laws of the Federal Congress.

Texas law certainly does not contravene the laws of Congress, for, as previously mentioned, that body, itself, has given to the Federal Courts this power of imprisonment for failure to pay a fine, 18 U.S.C.A. #3565. True, the Congress, by 18 U.S.C.A. #3569, provides, in general for the discharge of indigent prisoners, but, subdivision (a) of that statute provides that an indigent cannot be discharged under the aegis of that statute until he has served thirty days imprisonment. Hence, the Congress, in effect, has stated that it is not unconstitutional to imprison a poor person for at least thirty days; maybe thirty-one days is unconstitutional, but not thirty—it is the degree of application, not the principle itself.

Thus, if the Texas procedure should be held unconstitutional, the Constitution of the United States must be looked to. Rather, the current construction of the Constitution must be searched, for the Federal Constitution itself, as written, does not prohibit such incarceration.

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[11] 181 F.2d 772 (C.C.A., 10th, 1950).

III.

NO MORE THAN WEALTH SHOULD POVERTY PLACE A PERSON BEYOND THE SANCTIONS IMPOSED BY LAW.

IV.

A REQUIREMENT FOR ALL MISDEMEANOR COURTS TO SET UP CREDIT ARRANGEMENTS FOR MISDEMEANANTS SO AS TO ALLOW THEM TO PAY OUT THEIR FINES IN EASY INSTALLMENTS, WOULD RAISE INSURMOUNTABLE ADMINISTRATIVE AND JUDICIAL PROBLEMS, IMPOSING UNCONSCIONABLE BURDENS UPON SUCH INFERIOR COURTS.

V.

THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE A MISDEMEANOR COURT TO SET UP CREDIT ARRANGEMENTS FOR MISDEMEANANTS SO AS TO ALLOW THEM TO PAY OUT THEIR FINES IN EASY INSTALLMENTS.

Although Respondent submits that Petitioner's persistent violations of the law mark him as no more than a common scofflaw, Petitioner, on the other hand, has sought to divert attention from his own misdemeanors by mounting an attack against the traditional American socio-judicial concept dedicated to the proposition that a person should be punished for violating the law. He has created this diversionary sally by advancing the rationale that the law by which the Court jailed him is unconstitutional; that *any* incarceration for failure to pay a fine is unconstitutional since a poor person

would be most often subjected to the alternate jail sentence punishment while the man with money would be able to pay his fine and avoid jail. This, petitioner says, works an invidious discrimination against him and all his class. Ergo, he says, such a scheme of things is forbidden by the Federal Constitution. Petitioner left unmentioned, however, that the next and inexorable conclusion to which we would be catapulted by the train of logic thus unleashed would be that "indigents" are creatures specially favored by the law, without fiscal or penal responsibility for their misdemeanors.

Although the Constitution does not contain language forbidding the jailing of an indigent for failure to pay a fine, Petitioner resorts to "construction" and cites three comparatively recent United States Supreme Court cases in support of this proposition: *Griffin v. Illinois*,[17] *Douglas v. California*,[18] and *Williams v. Illinois*.[19]

Griffin held it to be unconstitutional for the State to require an indigent defendant to pay for the transcript needed (or at least extremely helpful) to appeal his trial court conviction. It was the judicial process for determining the guilt or innocence of the indigent that was under consideration, however, and not the type of punishment meted out after guilt vel non was established beyond a reasonable doubt. The Court said:

> "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due

[17] 351 U.S. 12, 76 S.Ct. 585 (U.S.Sup. 1956).
[18] 372 U.S. 353, 83 S.Ct. 814 (U.S.Sup. 1963).
[19] 398 U.S. ——, 90 S.Ct. 2018 (U.S.Sup. 1970).

Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." (351 U.S. 18, 76 S.Ct. 590)

It is a far cry, then, and one not called for by legal logic, to extend the import of this proposition to buttress so radical a proposition as that,—even though guilty, a misdemeanant's poverty would create an exemption shielding him from the consequences of that guilt!

In *Douglas*, it was held that the indigent defendants were denied equal protection of the law,

> ". . . where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (372 U.S. 357, 83 S.Ct. 816)

It was specially pointed out, however:

> "We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted as a matter of right to rich and poor alike . . . from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing . . . after the District Court of Appeal had sustained his conviction . . . or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction . . ." (372 U.S. 356, 83 S.Ct. 816)

In the case at bar, Petitioner has been convicted and

has had his conviction affirmed." Thus, it is beyond the pale, or even the penumbra thereto, of *Douglas*.

More nearly in point is *Williams v. Illinois*." In that case, decided at the last term, this Court held that when the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary non-payment of a fine and court costs, there is an impermissible discrimination and a violation of the Equal Protection Clause of the Federal Constitution. As the Court said:

> "The narrow issue raised is whether an indigent may be continued in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence." (398 U.S. ——, 90 S.Ct. 2019).

That Respondent's position in the case at bar is not precluded by *Williams*, as Petitioner here contends, can be found in the following language of this Court:

> "It bears emphasis that our holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of '$30 or 30 days'. We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly . . ." (398 U.S. ——, 90 S.Ct. 2023)

"*Tate v. State*, 445 S.W.2d 210 (Tex. Cr. App. 1969).
"398 U.S. ——, 90 S.Ct. 2018 (U.S.Sup. 1970).

* * * * *

"Nothing we hold today limits the power of the sentencing judge to impose alternative sanctions permitted by Illinois law; . . ." (398 U.S. ——, 90 S.Ct. 2024).

In *pari materia* with *Williams* is *Morris v. Schoonfield*," which, in itself, is of little or no precedental value. However, a written opinion concurring in the result, is a helpful explanation of the scope of *Williams*:

". . . Neither does it (*Williams*) finally answer the question whether the State's interest in deterring unlawful conduct and in enforcing its penal laws through fines as well as jail sentences will justify imposing an 'equivalent' jail sentence on the indigent who, despite his own reasonable efforts and the State's attempt at accommodation, is unable to secure the necessary funds . . ." (—— U.S. ——, 90 S.Ct. 2233).

That this Court was well aware of the problems posed by such a case as the one at bar, and was unwilling to go so far as advocated by Petitioner here, is evidenced by the following statement in *Williams*:

"The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." (398 U.S. ——, 90 S.Ct. 2024).

It is submitted, therefore, that this Court in *Williams*, was unwilling to give a scofflaw, who also qualified as an indigent, a *carte blanche* enabling him to

"—— U.S. ——, 90 S.Ct. 2232 (U.S.Sup. 1970).

violate at will, and free from danger of punishment, those statutes providing pecuniary sanctions only. Indeed, the result would be chaotic. An indigent would be licensed to tie up a parking space in downtown Houston, free of charge, all day long; he could spit at will on the sidewalks and in all public buildings; he could run all traffic lights; drive his automobile without a license, ad infinitum. Furthermore, any lawyer or judge who has even had a casual brush with the collection of open accounts or back alimony and child support payments will know that *the plea of poverty and inability to pay is the knee-jerk reaction of the overwhelming majority of debtors when asked to pay.* It would take unadulterated naivete not to acknowledge that a misdemeanant would plead poverty in order to avoid the consequences of his wrong doing. How, then, is the Court to separate the wheat from the chaff and determine who is the real indigent? The collateral issues raised would be insurmountable.

It should also be recognized what a corporation court is like in such a city as Houston. The judges are faced with an overwhelming number of cases, and are called upon to decide one right after the other and thus could not possibly give the time necessary not only to the consideration, but to the investigation as well, of each of these cases. For instance, suppose a person is fined $25.00 for driving a motor vehicle without an operator's license,—like Petitioner was fined on May 6, 1966. Suppose, further, that Petitioner had stated at that time that he was impoverished. With a dozen or more defendants standing around awaiting the disposal of their cases, what amount of time and/or investigation would be required of the sentencing judge

(under the United States Constitution) to give to this plea of indigency? Would he have been required to have the City of Houston spend more than $25.00 to investigate, inventory and appraise the assets of the Petitioner? Would he have been required to hold a conference with Petitioner's accountant, appraiser, and preacher (if any) before passing sentence? Unless some strict procedural guidelines are laid down, the Corporation Courts are going to tend to err either on the side of cursory investigation (which would not solve the problem posed) or they will so bog themselves down with collateral issues that they will have no time for judging.

Respondent would here like to emphasize the obvious; that the "nitty gritty" of a Corporation Court's work, dealing with hundreds of traffic violations each day as well as the inevitable number of drunks, petty misdemeanors, and the like, make its work much different from that of a Federal District Court. The latter Courts, although certainly not idle, by the very nature of the criminal matters over which they have original jurisdiction, are able to devote much more time to investigation and contemplation than is possible for a local Corporation Court. The Federal experience, it is submitted, would not be helpful here."

"The writer of this brief is reminded of a movie, a comedy he once saw, which is very apropos. Two ex-convicts, each with many convictions, were discussing their favorite penitentiaries. One said he liked Leavenworth and Atlanta the best because, "you meet a higher type of con in Federal stirs. —bankers, big time tax dodgers, and fellows like that." The point to be made is that the experience of the Federal Courts would not necessarily be helpful in solving Corporation or Police Court problems.

As previously quoted, this Court in *Williams* held that "*The State is not powerless to enforce judgments against those financially unable to pay a fine.*" And, quoting with approval from its own opinion in *Rinaldi v. Yeager*,[11] it held:

> "'Any supposed administrative inconvenience would be minimal, since * * * (the unpaid portion of the judgment) could be reached through the ordinary process of garnishment in the event of default.'" (398 U.S. ——, 90 S.Ct. 2024).

It is submitted that in Texas the Court *would* be "powerless to enforce judgments against those financially unable to pay a fine," and thus it would discriminate in their favor and against those who *are* so able. Unlike those of most other States, the Constitution of the State of Texas expressly forbids the garnishment of wages;[12] the liberal exemption statutes of Texas protect a married man's homestead, automobile, furniture, dogs, etc., from execution.[13] In fact, it is a practical impossibility to collect a judgment in Texas from a low income wage earner who is prudent enough not to keep a bank account. Thus, the rationale of *Rinaldi* would not apply.

Since *Williams* does not prohibit incarceration for failure to pay a pecuniary fine, *and as even the Federal statutes require an indigent to serve at least thirty days before being given an "indigency exemption,"*[14] it is respectfully submitted that this Court, in the

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[11]384 U.S. 305, 86 S.Ct. 1497 (U.S.Sup. 1966).

[12]Constitution of the State of Texas (1876), Art. XVI, Sect. 28.

[13]Art. 3832, V.A.C.S.

[14]18 U.S.C.A., #3569.

case at bar, should follow the doctrine of the Federal Courts in *Bowles v. District of Columbia*:"

> "Imprisonment is not provided either by the ordinance or by the Code as an alternative punishment; but imprisonment is very properly provided as the only available mode for the enforcement of the fines imposed as punishment. *Without it there would be no practicable means for the enforcement of fines.* . . ." (22 App. D.C. 328, emphasis added).

Persuasive, also, is *United States ex rel Privitera v. Kross*," which held:

> "Wholly beside the point is his contention that whereas lack of funds compels him to remain incarcerated for another sixty days, another defendant, possessed of $500, convicted of the same crime and similarly sentenced, could effect his immediate release. The sentence was not imposed upon petitioner because he was indigent; it was visited upon him because he had committed a crime. And once convicted, petitioner has no constitutional right that another defendant, no matter what his economic status, rich or poor, receive the same sentence for the same offense. . . " (239 F.Supp. 120).

It is of more than passing academic interest to note, also, that in 1850, Texas law provided:

> "For all fines assessed . . . in criminal cases not capital, the person convicted may stand committed to prison by order of the court until such fine and costs be paid; and when it shall be made to appear to the court that the person so committed hath no estate or means to pay such fine and costs, it shall be the duty of the court to discharge such person

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"22 App. D.C. 321 (Ct.App.D.C. 1903).
"239 F. Supp. 118 (U.S.D.C., S.D., N.Y. 1965).

from further imprisonment for such fine and costs as in its discretion may deem proper.'"[30]

This outright "poverty exemption" was abolished in 1856;[31] and has never been re-enacted. It should be presumed, therefore, that Texas gave Petitioner's theory a "reasonable and empirical" try and rejected it.

INSTALLMENT PAYMENTS

Rather than to take the drastic and patently untenable position that the Courts cannot enforce payment of their pecuniary penalties by means of incarceration, the Petitioners take the position that the poor should be allowed to pay their fines by means of a judicial adaptation of that old American habit of "buy now, pay later," or as to misdemeanors and traffic violations it could be defined, "speed and over park now—pay later in easy painless installments."

As an abstract proposition, this contention has a certain idealistic, albeit naive penumbra about it. A mere cursory look at this, however, will show that the questions raised are insurmountable:

1. What is the cut-off point between those persons entitled to installment payments and those who are not?
   a) Would the "equal protection" clause be violated if the indigent, because of his status as such, gained an economic advantage over his more affluent fellow citizens?
2. How would the amount of the payments and the intervals between the installments be decided?

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[30]Hartley, Digest of the Laws of Texas, 1850, Art. #401.
[31]General Laws, Seventh Legislature, 1857, Ch. 151, Pg. 228, Gammel's Laws.

(i.e., what would be the maximum income and/or assets he would be allowed to have before becoming liable even for the payment of installments?).

3. Would installment due process demand a hearing on the question of installment vel non separate and apart from the main trial to determine such collateral matters as the convicted Defendant's earning capacity, other family income, debts, mortgage payments, general needs, standard of living, market value of his personal and real assets, ad infinitum?

4. Would the Court have to provide machinery for review of the installment schedule when charges of Defendant's circumstances are alleged? Would the substantial evidence rule apply?

5. What would be the disposition of a case where a habitual misdemeanant also qualifies as an indigent? In other words, would there be a certain net worth, below which a person would be exempt from all penal responsibility?

6. The Constitution of the State of Texas prohibits the garnishment of wages, and its statutes provide such liberal exemption from execution that it is, as a practical matter, impossible to collect a monetary judgment from a person who does not own non-homestead realty and/or a bank account in his own name. In such a situation, how could the payment of the installments ever be exacted without the ultimate sanction of incarceration?

It is submitted, therefore, that the problems raised by forcing corporation courts to set up a "credit department," so to speak, would not only be insurmountable, but it would be an extension of the Constitution

beyond the wildest phantasy of its framers. Nor, it is submitted, does the Constitution require a "punishment" imposed for violation of the penal laws to be so easy and painless that it would cease to act as a deterrent. Nor should it be forgotten that the City of Houston offers a 30-day deferment," which is an installment of sorts.

WHEREFORE, it is submitted that Petitioner, Preston Armour Tate, by his repeated violations of the laws of the State of Texas, is in no position to use a plea of poverty to shield him from the consequences of driving a motor vehicle without a license, and in violation of the law, for more than two and one-half years, for running stop signs and red lights, and for driving a motor vehicle without license plates on more than one occasion. It is further submitted that his conviction and incarceration should in all things be sustained.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711

"Code of the City of Houston, #15-60.

WILLIAM OLSON
City Attorney
City Hall
Houston, Texas

JOSEPH G. ROLLINS
Senior Assistant City Attorney
City Hall
Houston, Texas

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, attorney for Respondent, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that copies of the above and foregoing Brief for Respondent have been deposited in the United States Mail, postage prepaid, on this the ---- day of September, 1970, to the following addresses: Mr. Peter Sanchez Navarro, Jr., Houston Legal Foundation, 708 Main Street, Houston, Texas 77002; Mr. Roy Lucas, The James Madison Constitutional Law Institute, 26 West 9th Street, Suite 9C, New York, N. Y. 10011; Mr. Norman Dorsen, School of Law, New York University, Washington Square South, New York, N. Y. 10003.

GILBERT J. PENA
Assistant Attorney General

In The

Supreme Court of the United States

October Term, 1970

No. 324

PRESTON A. TATE,

Petitioner,

vs.

HERMAN SHORT, Chief of Police, Houston, Texas,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

MOTION OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE

ALLAN ASHMAN
1155 E. 60th Street
Chicago, Illinois 60637
Attorney for Amicus Curiae
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

August 18, 1970

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Appendices:

A.—Fines Bureau Division Of The Corporation Court.

B.—Sources Of Money Received By The City Courts Department.

C.—Summary Of Selected Traffic Offenses And Dispositions For The Year 1968.

D.—Corporation Courts Administrative Department: Budget And Expenditures For 1968.

Table Of Authorities

Cases:

IN THE

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OCTOBER TERM, 1970

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Respondent.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE*

The National Legal Aid and Defender Association respectfully moves for leave to file a brief *amicus curiae* in this case in support of the petitioner.

The National Legal Aid and Defender Association, hereinafter called NLADA, is a non-profit corporation whose primary purpose is to assist in providing more and better legal services for the poor. Its members include the great majority of defender offices, coordinated

* Consent has been granted by Petitioner. The consent of the Attorney General of the State of Texas and the Corporation Counsel for the City of Houston, attorneys for the respondent, was requested but refused.

assigned counsel systems, and legal aid societies in the United States. The NLADA also has 1600 professional members, many of whom are practicing attorneys who represent indigent persons in criminal and civil matters.

The imprisonment of an indigent for failure to pay a fine is an issue of vital concern to members of NLADA, many of whom represent indigents who face possible imprisonment for failure to pay a fine. At the request of one of its member offices, the NLADA recently filed an *amicus curiae* brief in *Williams* v. *Illinois,* 398 U.S. ....., 90 S. Ct. 2018 (1970) and stated fully therein its interest as *amicus curiae.* In its amicus brief in *Williams* the NLADA urged that it was unjust to permit indiscriminate imprisonment of indigent defendants simply because of their inability to pay fines and unconstitutional to incarcerate an indigent defendant for a period in excess of that authorized by statute because of his financial inability to pay a fine.

The case now before the Court presents an equally compelling issue which requires constitutional resolution. Here the petitioner was incarcerated for twenty-one days for failure to pay a $425 fine. After having received credit of $105 at the rate of five dollars per day, the petitioner still owes $320 or has sixty-two days left to serve in jail for failure to pay, despite the fact that the sentencing court is a court of limited jurisdiction with the power to punish offenses only by fine and not by imprisonment. See Petitioner's Petition For Writ Of Certiorari, at p. 3. The Court of Criminal Appeals of Texas declined to order petitioner's release and rejected his argument that "because he is too poor to pay the fine his imprisonment is unconstitutional." *Tate* v. *Short,* 445 S.W. 2d 210 (Texas Ct. Crim. App. 1969).

The guiding philosophy of the NLADA and its members is that each citizen, regardless of his social and economic status, is entitled to equal justice under law. We urge, therefore, a reversal of the judgment of the Texas Court of Criminal Appeals because we believe that it is inherently unjust to incarcerate an indigent for involuntary non-payment of a fine and because we believe that the Constitution, pursuant to this Court's holding in *Williams,* specifically prohibits a court without power to punish offenses by imprisonment from incarcerating an indigent defendant because of his financial inability to pay a fine.

In view of the direct importance of this case to legal aid attorneys and public defenders serving the poor throughout the country, and to the poor themselves, the Executive Committee of the NLADA has authorized and instructed the NLADA staff to prepare and file an amicus brief in this case if so permitted by the Court.

Wherefore, it is respectfully prayed that this motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

/s/ Allan Ashman
1155 E. 60th Street
Chicago, Illinois 60637

Attorney for Amicus Curiae

National Legal Aid And
Defender Association

In The

Supreme Court of the United States

October Term, 1970

No. 324

PRESTON A. TATE,

Petitioner,

vs.

HERMAN SHORT, Chief of Police, Houston, Texas,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

We respectfully refer the Court to the preceding motion for leave to file this brief wherein the interest of the *amicus curiae* is set forth.

OPINION BELOW

The opinion of the County Criminal Court at La
No. 1 of Harris County, Texas was unreported. It is s
out in the appendix to Petitioner's Petition For Writ
Certiorari, at p. 2a. The opinion of the Court of Crimin
Appeals of Texas is reported at 445 S.W. 2d 210 (196
and is set out in the appendix to the Petitioner's Petitio
For Writ of Certiorari, at p. 1a.

JURISDICTION

The jurisdiction of this Court to review by writ
certiorari the judgment of the Court of Criminal Appeal
of Texas is conferred by 28 U.S.C. 1257 (3). Certiora
was granted on June 29, 1970.

STATUTORY PROVISIONS INVOLVED

The relevant State and Municipal statutory and cod
provisions are: (1) Articles 4-14, 45.06, and 45.53, Ver
non's Texas Ann. Code of Criminal Procedure; (2) Ar
ticle 11, § 12, Houston, Texas Charter; and (3) Section
15-60, 15-61, and 35-8, Code For the City of Houston
These statutes, charter, and code provisions are set ou
in full in Petitioner's Petition For Writ of Certiorari
at pp. 4-6.

QUESTION PRESENTED

Whether it is a violation of the Equal Protection Clause of the Fourteenth Amendment for a court of limited jurisdiction with no power to sentence defendants to jail to imprison indigent defendants who are unable to pay their fines.

STATEMENT OF THE CASE

The NLADA adopts Petitioner's Statement.

SUMMARY OF ARGUMENT

The Corporation Court of the City of Houston which convicted the petitioner and sentenced him to work off his fine clearly was without jurisdiction to sentence the petitioner to jail for a substantive offense. This Court's holding in *Williams* v. *Illinois*, 398 U.S. ....., 90 S. Ct. 2018 (1970), that the "Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status," is controlling in the present case. It follows, therefore, from the *Williams* holding that the statutory ceiling for a substantive offense be the same for all persons regardless of their ability to pay. Thus, if the statutory ceiling for a substantive offense is a fine, a sentencing court cannot automatically convert a fine into a jail term solely because a defedant is indigent and cannot forthwith pay a fine.

The Texas Legislature has made a fundamental decision that for offenders convicted in the Corporation Court a fine and not imprisonment is the appropriate penal sanction. However, when the Corporation Court sentences an indigent defendant to jail for failure to pay a fine it subverts the legislative decision to deal with offenders "by fine only."

ARGUMENT

I.

IT IS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT FOR A COURT OF LIMITED JURISDICTION WITH NO POWER TO SENTENCE DEFENDANTS TO JAIL TO IMPRISON INDIGENT DEFENDANTS WHO ARE UNABLE TO PAY THEIR FINES.

The NLADA stated in its *amicus curiae* brief filed in *Williams* v. *Illinois,* 398 U.S. ....., 90 S. Ct. 2018 (1970), that just as poverty should not be a reason for denying a man access to trial and appellate courts, see *Griffin* v. *Illinois,* 351 U.S. 12 (1956) and *Douglas* v. *California,* 372 U.S. 353 (1963), so poverty should not be a reason for incarcerating an individual. Yet, a rich man who can pay his fine avoids imprisonment while a poor man who cannot pay his fine usually *is* imprisoned. In this situation the poor man often suffers punishment for his poverty rather than for conviction of a substantive offense.

The case presently before this Court presents another striking example of a denial of equal protection of laws wherein a state apportions justice according to the dollar. It is, as this Court noted in *Williams,* a new case exposing "old infirmities which apathy or absence of challenge have permitted to stand." 90 S. Ct. at 2024. As in *Williams* the broad question, and one indirectly at issue in the present case, is whether any statutory scheme resulting in an indigent's incarceration because of his inability to pay a fine is permissible under the Constitution. Not at issue is the question of whether fines, as such, are a

valid criminal sanction or whether a court has the authority to order "fine or imprisonment" sentences. The narrow question for determination is whether an indigent can be imprisoned for involuntary non-payment of a fine by a court that does not have jurisdiction to order "fine or imprisonment" sentences, but may only order a fine.[1]

In *Williams* the indigent appellant was sentenced to 101 *additional* days in jail beyond his maximum term of imprisonment, because of his inability to pay a fine and court costs. In the instant case, the indigent petitioner has been incarcerated for involuntary non-payment of a fine by a court of limited jurisdiction with power to punish substantive offenses by fine only and not by imprisonment. Houston, Texas Charter, Art. 11, Sec. 12. The Houston Charter and City Code, and their application in the case at bar, raise a serious question of a fundamental deprivation of rights under the Equal Protection Clause of the Fourteenth Amendment.

The Corporation Court of the City of Houston which convicted the petitioner and sentenced him to work off his fine clearly was without jurisdiction to sentence the petitioner to jail for a substantive offense. The statute creating the court grants jurisdiction to the Corporation Court "in all criminal cases arising under the criminal law of this State (Texas), in which punishment is by fine only. . . ." See Art. 4-14, Vernon's Texas Ann. Code of Criminal Procedure. The Court of Criminal Appeals of Texas has already spoken on the issue of whether

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[1] On this point see also *Morris* v. *Schoonfield*, 398 U.S. ....., 90 S. Ct. 2232 (1970), where this Court vacated judgment and remanded in light of intervening legislation and its holding in *Williams*.

the jurisdiction of a court of limited jurisdiction, like Houston's Corporation Court, can be extended. In *Ex parte Morris*, 325 S.W. 2d 386 (Texas Ct. Crim. App. 1959), a case involving a charge of trespass brought originally before a Justice Court, the defendant was fined *and* his hunting license revoked. The Court of Criminal Appeals held that the Justice Court was without jurisdiction to do anything but fine a party. It reaffirmed the proposition that justices of the peace were without authority to try a prosecution under a criminal statute authorizing a punishment by imprisonment.

The sentencing practice now on review works a greater hardship and permits a more invidious discrimination upon the poor than the Illinois practice which was found unconstitutional in *Williams*. In *Williams* the appellant was forced to serve a *longer* term of incarceration than the law allowed for his offense, simply because he was poor. Here, the petitioner actually is serving a far more onerous sentence than the law contemplates or permits for his offense—a jail term as opposed to paying a fine —because he is poor. In both instances imprisonment as a form of punishment responds to no valid objective of the criminal law. Rather, imprisonment responds only to the particular defendant's financial situation. In *Williams* this Court underscored the proposition that a judge who sentences an indigent defendant to 30 days or 30 dollars may justifiably find that in order to punish the defendant for the substantive offense or deter others who might be inclined to commit similar crimes, the immediate imposition of some sort of penalty greater than a future obligation to pay is required. A judge's discretion to sentence certainly contemplates such judgments.

However, simple and unequivocal punishment for poverty serves no natural purpose.

We submit, therefore, that this Court's holding and rationale in *Williams*—that the "Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status"—is controlling in the present case. 90 S. Ct. at 2023-2024. It must follow from this holding that the statutory ceiling for a substantive offense be the same for all persons regardless of their ability to pay. Thus, if the statutory ceiling for a substantive offense is a fine, a sentencing court cannot automatically convert a fine into a jail term solely because a defendant is indigent and cannot forthwith pay the fine. See *Morris* v. *Schoonfield, supra* at 90 S. Ct. 2233 (White, J., concurring).

This Court stated in *Williams* that "a statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly." 90 S. Ct. at 2023. We do not suggest that a court is rendered powerless to enforce its fines. On the contrary, this Court emphasized that its decision in *Williams* does not "preclude imprisonment for willful refusal to pay a fine or court costs." 90 S. Ct. at 2023, footnote 19.

Also, alternative means, short of imprisonment, do exist for the State to enforce judgments against persons too poor to pay a fine. See 90 S. Ct. at 2024, footnote 21, and accompanying text discussing the collection of

fines through installment plans. In short, if the purpose of incarcerating an indigent is to enforce payment of fines, such a purpose is not furthered in the case of an indigent who cannot pay the fine. All that incarceration accomplishes is to give defendants with money an undue advantage in that they can avoid a jail sentence by paying their fines, while the indigent defendant is incarcerated regardless of his desire or inability to pay. See e.g., *People* v. *Collins,* 47 Misc. 2d 210, 261 N.Y.S. 2d 970 (Orange County Ct. 1965), *People* v. *Saffore,* 18 N.Y. 2d 101, 218 N.E. 2d 686 (1966), and *Sawyer* v. *The District of Columbia*, 238 A. 2d 314 (D.C. Ct. App. 1968).

Imprisonment for non-payment of a fine should be relied upon only as a method of correction and punishment for individuals who willfully refuse to pay a fine. A person must be capable of paying a fine before he can be imprisoned for his "refusal" to pay it. Under the present sentencing practice of the Corporation Court of the City of Houston (see Appendix A) one of two persons convicted of identical offenses, under essentially similar circumstances and upon comparable records, and sentenced to pay the same fines can walk out of court or be transported to jail depending entirely upon his financial position, despite the fact that the substantive offense for which both were convicted carries no jail term. We ask only that this Court insure uniform sentencing practices and that imprisonment for failure to pay a fine be limited so as not to include those persons who fail to pay because they are financially unable to pay.

II.

THE ROUTINE PRACTICE OF THE HOUSTON CORPORATION COURT OF INCARCERATING INDIGENTS FOR INVOLUNTARY NON-PAYMENT OF FINES SUBVERTS THE EXPLICIT INTENT OF THE TEXAS LEGISLATURE TO MAKE FINES THE ONLY PENAL SANCTION AVAILABLE TO SUCH A COURT.

In granting jurisdiction to the Houston Corporation Court "in all criminal cases arising under the criminal laws of (Texas), in which *punishment is by fine only* . . ." (emphasis added), the Texas Legislature, in effect, has made a fundamental decision that for offenders convicted in the Corporation Court a fine and not imprisonment is the appropriate penal sanction. See Art. 4-14, Vernon's Texas Ann. Code of Criminal Procedure. This reflects a determination that the safety and welfare of the community does not require offenders to be incarcerated in cases involving the substantive offenses over which the Corporation Court has jurisdiction. However, if, as here, a defendant is not able to pay a fine and the court nevertheless fines him and orders his immediate imprisonment, it has in fact sentenced the defendant to imprisonment thereby subverting the legislative decision to deal with offenders "by fine only." See Rubin, *The Law of Criminal Correction* (1963), at 254.

The routine practice of the Corporation Court of incarcerating indigent defendants for involuntary non-payment of fines (see Appendix A) makes even less sense when viewed against another function of the fine. Clearly, fines are a form of penal sanction, but, at least in Houston, fines also are an important and substantial source of municipal revenue. For example, in 1968 almost $4,500,000 in fines were collected by the Corporation Court for a

wide variety of traffic offenses. See Appendix B. Of this amount, slightly less than two million dollars in fines were assessed for various speeding violations while almost one hundred thousand dollars in fines were assessed for loud and defective mufflers. See Appendix C. By comparison the entire 1968 budget for the City of Houston's Corporation Courts Administrative Department was under seven hundred thousand dollars. See Appendix D.

In Houston, then, fines levied against traffic offenders are intended to accomplish more than punishment *per se*. By establishing fines as the appropriate method for dealing with offenders appearing before local corporation courts, the Texas Legislature has not only denominated the fine as the appropriate penal sanction but has assured cities of an important source of revenue. Nevertheless, from a penological and monetary standpoint no lawful or rational end is served by incarcerating an indigent defendant who is unable to pay a fine.

CONCLUSION

For the reasons stated we respectfully submit that the judgment of the Court of Criminal Appeals of Texas in this case should be reversed.

Respectfully submitted,

ALLAN ASHMAN
1155 E. 60th Street
Chicago, Illinois 60637

Attorney for Amicus Curiae
NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION

August 18, 1970

APPENDIX A*

FINES BUREAU DIVISION OF THE CORPORATION COURT

The function of this division is to accept voluntary payments from citizens for moving traffic violation citations, record transactions on the cash register, process moving traffic violation citations for court, answer inquiries from citizens pertaining to the violations and make certified copies of dispositions of complaints when requested by letter.

Persons, except juveniles and "No Operator's License" defendants, who wish to pay the fines for their violations without appearing in court may do so at the Fines Bureau. These payments are recorded on the cash register by docket number and violation and rung as a complaint. *If a person appears in court and is found guilty and does not have money to pay his fine, he is committed to jail to serve the amount of the fine at the rate of $5.00 per day.* (Emphasis added.) In certain cases a person may be allowed $7.50 credit per day. The complaint in this case is rung as a sentence. If the citizen pays his fine while in jail, the transaction is recorded as TDR (today's delinquent receipts).

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* All information contained in Appendices A-D is taken from an official copy of the 1968 Annual Report of the City Courts Department and Corporation Courts Administrative Department for the City of Houston.

APPENDIX B

SOURCES OF MONEY RECEIVED BY THE CITY COURTS DEPARTMENT

rce of Money Received	1967	1968
affic Violations	$4,185,126.06	$4,303,339.49
king Violations	286,335.42	371,491.31
port Violations	1,210.00	5,326.00
upon Sales	47,916.00	70,810.00
rt Costs	1,170.60	2,716.10
tals	$4,521,758.08	$4,753,682.90

SUMMARY OF SELECTED TRAFFIC OFFENSES

AND DISPOSITIONS FOR THE YEAR 1968

Selected Offenses	Cases Filed	Cases Disposed	Voluntary Payment	Bond Forfeiture	Plea of Guilty	Found Guilty
Ran red light	22,067	20,686	40	827	17,522	634
Ran boulevard stop sign	8,593	8,193	14	369	6,866	246
Exceeding speed limit	114,828	107,549	200	2,873	93,874	2,372
Improper turn from wrong lane	4,631	4,506	6	118	3,959	88
Defective muffler	4,086	3,662	3	424	2,552	82
Improper changing of traffic lanes	1,718	1,569	3	94	1,053	186
No vehicle registration tags	5,931	5,017	7	523	3,102	76
No operating drivers license	58,867	47,986	15	6,054	25,159	814
Excessive noise by spinning tires	3,162	2,805	2	251	2,153	93
Prohibited device-loud muffler	4,264	3,876	2	404	2,789	96
Other	*	*	*	*	*	*
Totals For All Traffic Offenses	307,466	279,965	407	15,713	215,241	8,876

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FOR REMAINDER OF PAGE

APPENDIX C

SES

Bond Forfeiture	Plea of Guilty	Found Guilty	Not Guilty	Nolle Prosequi	Quashed	Dismissed	Fines Assessed
827	17,522	634	284	14	1,358	7	$ 299,718.04
369	6,866	246	118	6	574	--	115,332.76
2,873	93,874	2,372	929	54	7,220	27	1,821,208.77
118	3,959	88	55	1	279	--	45,912.35
424	2,552	82	34	2	564	1	47,886.00
94	1,053	186	24	--	204	5	33,630.00
523	3,102	70	58	9	1,241	7	45,730.00
6,054	25,159	814	158	92	15,694	10	865,489.03
251	2,153	93	61	5	239	1	41,402.35
404	2,789	99	55	5	512	1	51,432.35
*	*	*	*	*	*	*	*
15,713	215,241	8,876	2,657	313	36,647	111	$4,537,509.44

CORPORATION COURTS ADMINISTRATIVE DEPARTMENT
BUDGET AND EXPENDITURES 1968

APPENDIX D

Type Expenditures	Budget		Expended		Under/Over	
A. Personal Services						
4. Salaries	$608,969.00		$517,072.33		$91,896.67	
		$608,969.00		$517,072.33		$ 91,896.67
B. Supplies						
1. Office	20,000.00		15,900.45		4,099.55	
		20,000.00		15,900.45		4,099.55
C. Contractual						
1. Transportation	1,200.00		1,107.84		92.16	
3. Communication	8,500.00		7,450.49		1,049.51	
6. Rental	4,100.00		2,910.70		1,189.30	
44. Miscellaneous	13,500.00		10,184.96		3,315.04	
		27,300.00		21,653.99		5,646.01
D. Maintenance						
2. Furniture & Fixtures	2,000.00		531.96		1,468.04	
7. Automotive	9,000.00		9,263.45		(263.45)	
		11,000.00		9,795.41		1,204.59
E. Capital Outlay	7,500.00		8,529.23		(1,029.23)	
		7,500.00		8,529.23		(1,029.23)
TOTALS		$674,769.00		$572,951.41		$101,817.59

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Houston, Texas,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF

Norman Dorsen
New York University School of Law
402 Washington Square South
New York, N. Y. 10012

Peter Sanchez-Navarro, Jr.
708 Main Street
Houston, Texas 77002

Roy Lucas
The James Madison Constitutional Law Institute
26 West 9th Street
New York, N.Y. 10011

Attorneys for Petitioner

Of Counsel:
Stanley A. Bass
Douglas J. Kramer
R. Brock Shamberg

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REPLY BRIEF

I.

Respondent's brief fails to respond to the central point raised by Petitioner—that the principle applied by the Court in *Williams v. Illinois*, 399 U.S. 235 (1970), mandates reversal of this case. Petitioner, like Williams, was incarcerated beyond the maximum term provided by the Texas legislature for the substantive offense because the traffic offenses Petitioner committed were punishable by fine only. Such incarceration is impermissible under *Williams*, which held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." 399 U.S. at 244.

Respondent's argument rests chiefly on the supposed inconvenience which may result if this Court holds for Petitioner. But in *Williams* all eight participating Justices agreed that inconvenience is not a constitutionally sufficient justification for a denial of equal protection. 399 U.S. at 245 (opinion of the Court); *id.* at 264 (Harlan, J., concurring).

II.

A recent decision of the Supreme Court of California, *In re Antazo*, Crim. No. 13857 (Sept. 3, 1970), furnishes persuasive support for reversal of the case at bar.* In the California case Antazo and a co-defendant were charged with arson and related crimes. Antazo pleaded guilty to arson; his co-defendant was convicted after trial by jury. Each received identical suspended sentences, and each was to be released on probation on certain conditions, including payment of a fine of $2500 plus a penalty assessment of $625. The trial court also ordered that if either defendant could not or would not pay he should be jailed one day for each $10 unpaid. (Reply Br. A. 1).

The co-defendant made the required payment and was released. (Reply Br. A. 5.) Antazo then petitioned for habeas corpus relief. The Supreme Court of California granted the writ and ordered Antazo discharged. The court held:

> Although a direction for confinement for default in payment of a fine may appear to apply equally to both the rich offender and the poor one . . . we conclude that it constitutes an invidious discrimination on the basis of wealth in violation of the equal protection clause of the Fourteenth Amendment. (Reply Br. A. 1.)

Accord *Arthur v. Schoonfield*, 315 F.Supp. 548, 553 (D. Md. 1970).

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*This decision, which was rendered too late for reference in Petitioner's principal brief, is set out in the Appendix to this Reply Brief.

In thus applying *Williams v. Illinois*, the Supreme Court of California went further than this Court need go in the present case. Antazo's jail term, including that imposed for non-payment of the fine, was *not* in excess of the "statutory ceiling" for imprisonment for the substantive offense (Reply Br. A. 13, n. 9), as was Petitioner's confinement here and as was the confinement in *Williams*. Despite this distinction, the California Supreme Court held *Williams* applicable because of the patent discrimination against indigents resulting from incarceration because of inability to pay a fine. This Court should do likewise here.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

NORMAN DORSEN
New York University School of Law
402 Washington Square South
New York, N.Y. 10003

PETER SANCHEZ-NAVARRO, JR.
708 Main Street
Houston, Texas 77002

ROY LUCAS
The James Madison Constitutional Law Institute
26 West 9th Street
New York, N.Y. 10011

Attorneys for Petitioner

Of Counsel:

STANLEY A. BASS
DOUGLAS J. KRAMER
R. BROCK SHAMBERG

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In re SIMEON ANTAZO)
) Crim. 13857
on Habeas Corpus.)

We are confronted here with the question whether a convicted indigent defendant upon being sentenced or otherwise ordered to pay a fine and a penalty assessment can be required to serve them out in jail at a specified rate per day because he is unable to pay them. As we explain *infra*, such a defendant has no choice at all and in reality is being imprisoned for his poverty. Although a direction for confinement for default in payment of a fine may appear to apply equally to both the rich offender and the poor one, actually the former has the opportunity to escape his confinement while the right of the latter to pay what he cannot, is a hollow one. We cannot countenance such a difference in treatment and, absent any compelling state interest necessitating it, we conclude that it constitutes an invidious discrimination on the basis of wealth in violation of the equal protection clause of the Fourteenth Amendment. We will not permit this petitioner to be given such a Hobson's choice.

Simeon Munsell Antazo, petitioner herein, was confined in the Santa Clara County jail at the Elmwood Rehabilitation Center in Milpitas pursuant to a superior court probation order requiring him to pay, as a condition of probation, a fine in the amount of $2,500 plus a penalty assessment in the amount of $625, or, in lieu of payment thereof to be imprisoned in the county jail one day for each $10 of the unpaid amount. Petitioner seeks a writ of

habeas corpus on the ground that Penal Code sections 1205[1]

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[1]Section 1205 of the Penal Code provides in pertinent part:

"A judgment that the defendant pay a fine, with or without other punishment, may also direct that he be imprisoned until the fine is satisfied and may further direct that such imprisonment begin at and continue after the expiration of any imprisonment imposed as a part of the punishment or of any other imprisonment to which he may theretofore have been sentenced. Every such judgment must specify the extent of the imprisonment for nonpayment of the fine, which must not be more than one day for each five dollars ($5) of the fine, nor exceed in any case the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted. A defendant held in custody for nonpayment of a fine shall be entitled to credit on the fine for each day he is so held in custody, at the rate specified in the judgment. When the defendant has been convicted of a misdemeanor, a judgment that the defendant pay a fine may also direct that he pay the fine within a limited time or in installments on specified dates and that in default of payment as therein stipulated he be imprisoned in the discretion of the court either until the defaulted installment is satisfied or until the fine is satisfied in full; but unless such direction is given in the judgment, the fine shall be payable forthwith.

"Except as otherwise provided in case of fines imposed as conditions of probation, the defendant must pay the fine to the clerk of the court, or to the judge thereof if there is no clerk, unless the defendant is taken into custody for nonpayment of the fine, in which event payments made while he is in custody shall be made to the officer who holds him in custody and all amounts so paid shall be forthwith paid over by such officer to the court which rendered the judgment. The clerk shall report to the court every default in payment of a fine or any part thereof, or if there is no clerk, the court shall take notice of such default. If time has been given for payment of a fine or it has been made payable in installments, the court shall, upon any default in payment immediately order the arrest of the defendant and order him to show cause why he should not be imprisoned until the fine or installment thereof, as the case may be, is satisfied in full. If the fine, or installment, is payable forthwith and it is not so paid, the court shall without further proceedings, immediately commit the defendant to the custody of the proper officer to be held in custody until the fine or installment thereof, as the case may be, is satisfied in full. The provisions of this section shall apply to any violation of any of the codes or statutes of the State of California punishable by a fine or by a fine and imprisonment."

and 13521,[2] which authorize the imposition of a fine (§ 1205) and the levy of a penalty assessment (§ 13521) as well as imprisonment pending payment thereof (§ 1205) are unconstitutional as applied to him. He contends in his petition that his imprisonment pursuant to these statutes as a result of his inability, due solely to his indigency, to pay his fine and penalty assessment constitutes an invidious discrimination based on poverty in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. We issued an order to show cause and ordered petitioner released upon his own recognizance pending final determination of this matter.

We first set forth the pertinent facts. On November 30, 1968, in the early hours of the morning, a fire broke out at the San Jose Speed and Marine Shop. Investigating officers of the San Jose Police Department discovered that the rear door was unlocked, that all windows were intact, and that the burglar alarm had not sounded. Steven Clausman, one of the owners, informed the police that certain inventory items and $320 in currency were missing from the shop. Arson investigators later determined that flammable liquid had been used to set five separate fires inside the establishment.

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[2]Section 13521 provides in pertinent part: "On and after the effective date of this section, there shall be levied a penalty assessment in an amount equal to five dollars ($5) for every twenty dollars ($20), or fraction thereof, of every fine, penalty, and forfeiture imposed and collected by the courts for criminal offenses, . . . It shall then be transmitted to the State Treasury to be deposited in the Peace Officer's Training Fund . . ."

"In any case where a person convicted of any offense to which this section applies is imprisoned until the fine is satisfied, the judge may waive all or any part of the penalty assessment the payment of which would work a hardship on the person convicted or his immediate family."

Hereafter, unless otherwise indicated, all section references are to the Penal Code.

The Salinas Police Department later received information that petitioner was in possession of the missing speed equipment. They contacted petitioner and he voluntarily surrendered. After being advised of his constitutional rights, petitioner freely gave a statement to the Salinas police and to arson investigators from San Jose. In this statement petitioner admitted that he had conspired with Clasuman to set fire to the shop, that he was to remove some of the inventory and retain it until Clausman had received settlement for his losses, and that he was to receive $1,000 for his part in the affair. Petitioner was booked at the Santa Clara County jail on a charge of arson and released on his own recognizance. Clausman was also arrested on the same charge.

On January 13, 1969, the Santa Clara County Grand Jury returned an indictment against petitioner and Clausman charging with them arson (§ 448a), arson of insured personal property (§ 450a), and conspiracy to commit said substantive offenses (§ 182, subd. 1). Petitioner was arraigned and again released upon his own recognizance. Both defendants entered pleas of not guilty and the cause was set for trial.

Petitioner subsequently withdrew his plea of not guilty and entered a plea of guilty to the arson count. The court dismissed the other two counts and referred the matter to the probation officer for investigation and report. Petitioner remained at large on his own recognizance. In the meantime he testified as a witness for the prosecution at Clasuman's trial. A jury convicted Clausman on all three counts.

On April 15, 1969, Clausman and petitioner were arraigned for judgment. After considering the probation reports of both men, the trial judge stated that he considered both defendants "as standing in the same and identical shoes before the Court with respect to responsibility for these matters." The court then ordered that imposition of sentence on each defendant be suspended for a period of three years, and that each defendant be released upon probation on the condition, among others, that each pay a fine of

$2,500 plus a penalty assessment of $625 "or in lieu of payment thereof one (1) day in the County Jail for each $10.00 unpaid."

The deputy public defender informed the court that petitioner because of his financial condition would probably have to serve out his fine, and requested the court to waive the *penalty assessment.* The judge denied the request, stating that he did not believe that petitioner could be imprisoned for nonpayment of the assessment. Clausman paid his fine and assessment, and was released on the following morning; petitioner, lacking funds with which to make payment, began serving his sentence forthwith at the rate specified in the probation order. On July 24, the deputy public defender again requested the trial judge to waive the penalty assessment; the request was again denied.

Petitioner complains that his imprisonment is illegal in that he has been deprived of his liberty solely because of his indigency while his co-defendant, possessed of funds with which to pay both the fine and assessment, has been released.

Respondent[3] asserts in his return that habeas corpus is unavailable to petitioner and that in any event the above-mentioned condition of probation ordering petitioner's imprisonment[4] for nonpayment of fine (a) "is without constitutional infirmity" and (b) is a reasonable one relating to petitioner's reformation and rehabilitation. In his traverse to the return petitioner broadens his attack on the probation order, contending that its conditions were unreasonable since they violated his "constitutional rights to due process, equal protection and against excessive fines as pro-

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[3]Respondent is Charles J. Prelsnik, the Sheriff of Santa Clara County, although the return to the order to show cause appears to have been by both the respondent and the People. Hereafter we shall refer to respondent in the singular.

[4]We will use the language of the statute (§ 1205) although petitioner was confined in the county jail.

vided in the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Sections 6 and 13 of the Constitution of the State of California." We first consider the availability of the relief sought.

The gist of respondent's argument is as follows: An appeal lies from an order granting probation following conviction (citing § 1237, subd. 3, as it read prior to the 1968 revision); petitioner did not appeal; as a general rule, habeas corpus cannot serve as a substitute for an appeal (citing In re Dixon (1953) 41 Cal.2d 756, 759); and petitioner has urged no special circumstances to warrant an exception to such rule.

We confronted such an argument in In re Black (1967) 66 Cal.2d 881 where we had this to say: "We referred to such restrictions on the use of the writ in In re Dixon (1953) 41 Cal.2d 756, 759 [264 P.2d 513]: 'The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction. [Citations.]' (In accord: In re Shipp (1965) 62 Cal.2d 547, 551-552 [43 Cal. Rptr. 3, 399 P.2d 571]; In re Manchester (1949) 33 Cal.2d 740, 742 [204 P.2d 881]; In re Connor (1940) 16 Cal.2d 701, 705 [108 P.2d 10].) But we made clear in *Dixon* and in other cases that although a remedy by appeal or other direct attack might have been available, the writ of habeas corpus nevertheless will lie where special circumstances are presented. (In re Newbern (1960) 53 Cal.2d 786, 789-790 [3 Cal. Rptr. 364, 350 P.2d 116]; In re Osslo (1958) 51 Cal.2d 371, 376-377 [334 P.2d 1]; In re Bine (1957) 47 Cal.2d 814, 817-818 [306 P.2d 445]; In re Dixon, *supra*, In re Seeley (1946) 29 Cal.2d 294, 296 [176 P.2d 24].) It has been said that the 'requirement of exhaustion of the appellate or other remedy . . . is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ.'

(Witkin, Cal. Criminal Procedure (1963) p. 769; see In re Bell (1942) 19 Cal.2d 488, 495 [122 P.2d 22].)" (*Id.* at pp. 886-887.)

In the instant case petitioner bases his petition for a writ of habeas corpus upon a constitutional question of great magnitude—that he has been deprived of his liberty in violation of rights secured to him by the equal protection clause. This court has held that the presence of a constitutional question of extraordinary importance constitutes special circumstances sufficient to relieve a petitioner from the operation of the above-mentioned general rule. (In re Allen (1969) 71 A.C. 409, 410; In re Bell (194[illegible]l. 2d 488, 495. See also In re Oxidean (1961) 19[illegible]pp. 2d 814, 817; Witkin, Cal. Criminal Proceudre, § 79[illegible] at p. 770). Thus, as we said In re Bell, *supra*, 19 Cal.2d 488, 495, "while a few courts require that all available remedies by appeal be exhausted before habeas corpus can be invoked to test constitutionality [citation], most jurisdictions, including California, do not make the requirement mandatory . . ." In view of the foregoing we conclude that petitioner has demonstrated that the instant case presents special circumstances within the above-mentioned rule. Accordingly his failure to appeal from the probation order does not preclude our consideration of the constitutional question presented by the facts of this case.

We, therefore, take up petitioner's main contention that his imprisonment solely because of his financial inability to pay the fine imposed on him as a condition of probation offends the equal protection clause of the Fourteenth Amendment. The essence of this claim is that, while ostensibly applying to both the rich and the poor, actually a sentence to pay a fine, together with a direction that a defendant be imprisoned until the fine is satisfied, gives an advantage to the rich defendant which is in reality denied to the poor one. "The 'choice' of paying $100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor,

. . ." (Remarks of former Associate Justice Goldberg in *Goldberg, Equality and Governmental Action* (1964) 39 N.Y.U.L. Rev. 205, 221.) To put it in another way and in the context of the present case, when a fine in the same amount is imposed upon co-defendants deemed equally culpable with the added provision for their imprisonment in the event of its nonpayment, an option is given to the rich defendant but denied to the poor one. While the poor man has the "right" to obtain his release by payment of the fine, in actuality the "right" is meaningless to him. It is this difference in the final treatment of each which petitioner attacks.[5]

We make two preliminary observations. First, we are aware that the practice of ordering imprisonment for nonpayment of fines has been long and well established in Anglo-American law and has prevailed for sometime in the courts of most of our states. (Williams v. Illinois (1970) ___ U.S. ___, 38 U.S.L. Week 4607, 4608; Note, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days"* (1969) 57 Cal. L. Rev. 778, 780-787.) Nevertheless, while a factor to be considered, the long-standing recognition of this practice does not foreclose its reassessment in the light of the continued evolution of fundamental precepts of our constitutional system, for "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack, . . ." (Williams v. Illinois, *supra*, ___ U.S. ___, U.S.L. Week 4607, 4608.) An abiding concern for equality in all areas of today's society has not spared established practices from exposure under the

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[5]We do not consider petitioner's further complaint, "In addition to ignoring petitioner's lack of financial resources, the court below also gave no consideration whatever to his prompt surrender and admission of guilt . . ., nor to his willing cooperation throughout the continued investigation of the case, nor to his assistance to the district attorney in testifying [against Clausman]."

spotlight of equal protection principles. (See, e.g., Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent* (1969) 21 Stan. L. Rev. 767, 774-780; Note, *Developments in the Law–Equal Protection* (1969) 82 Harv. L. Rev. 1065, 1067.)

Second, we note that the factual predicate underlying petitioner's contention in the case at bench is unquestionably true. Respondent does not dispute,[6] nor could he, that application of the California statutes here involved necessarily results in different treatment for the rich defendant and for the poor one. "The nature of the penalty *actually inflicted* by a sentence of '$25.00 or 10 days' depends on the defendant financial ability and personal choice. If he chooses, *and is able,* to pay the fine, he can avoid imprisonment. If he chooses imprisonment, he can avoid the fine. If he cannot pay the fine, he cannot avoid imprisonment." (Italics added.) (Wildeblood v. United States (D.C.C.A. 1960) 109 U.S. App. D.C. 163, 164, 284 F.2d 592, 593, dissenting opinion of Edgerton, J.) The fact that this difference in treatment may be unintended and results from the application of a statute which is fair on its face, does not preclude an attack on equal protection grounds upon the statute as applied. (Griffin v. Illinois (1956) 351 U.S. 12; Strattman v. Studt (1969) 20 Ohio St.2d 95 [253 N.E. 749, 751-752].) We first set forth the standards by which such an attack can be evaluated.

We begin with the fundamental principle of *Griffin* that justice must be administered to all persons equally. In that case it was held that the state's failure to provide indigent defendants in a criminal case with a transcript of the trial proceedings at public expense so that they could obtain adequate appellate review constituted an invidious discrimination in violation of the equal protection clause of the

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[6] As noted above respondent's contentions go solely to the question of whether the discrimination of which petitioner complains is justified.

Fourteenth Amendment. The high court declared: "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color . . . Such a denial [of a free transcript] is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. [Fn. omitted.] There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (Griffin v. Illinois, *supra*, 351 U.S. at pp. 17-19, passim.) Decisions following *Griffin*[7] have consistently reaffirmed this fundamental principle of equal justice.

However, the equal protection clause does not require "Absolute equality" (Douglas v. California, *supra*, 372 U.S. 353, 357), is not "a demand that a statute necessarily apply equally to all persons" (Rinaldi v. Yeager (1966) 384 U.S. 305, 309) and permits a state to "provide for differences so long as the result does not amount to . . . an 'invidious discrimination.' " (Douglas v. California, *supra*, at p. 356.) Simply stated the "concept of the equal protection of the laws compel recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (Purdy & Fitzpatrick v. State of California (1969) 71 A.C. 587, 600.)

The traditional test has been that the "distinction drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal."

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[7]See, for example, Eskridge v. Washington Prison Bd. (1958) 357 U.S. 214, 216; Burns v. Ohio (1959) 360 U.S. 252, 257-258; Smith v. Bennett (1961) 365 U.S. 708, 709, 713-714; Douglas v. California (1963) 372 U.S. 353, 355-356, 357-358; Lane v. Brown (1963) 372 U.S. 477, 483-485; Draper v. Washington (1963) 372 U.S. 487, 499-500; Long v. District Court of Iowa (1966) 385 U.S. 192, 194-195; Anders v. California (1967) 386 U.S. 738, 741, 745; Entsminger v. Iowa (1967) 386 U.S. 748, 751; Roberts v. LaVallee (1967) 389 U.S. 40, 42; Williams v. Illinois, *supra*, ____ U.S. ____, 38 U.S.L. Week 4607, 4608.

(McDonald v. Board of Election (1969) 394 U.S. 802, 809). But a stricter standard has been prescribed in cases involving "suspect classifications" or "fundamental interests." (Purdy & Fitzpatrick v. State of California, *supra*, 71 A.C. at p. 600.) In Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784-785, we recently had occasion to epitomize the standards to be applied in evaluating classifications under the equal protection clause: "As this court has previously noted, [fn. omitted] the United States Supreme Court has tended to employ a two-level test in reviewing legislative classifications under the equal protection clause. In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. (See McDonald v. Board of Election Comrs. (1969) 394 U.S. 802, 809 [22 L.Ed.2d 739, 745-746, 89 S.Ct. 1404]; McGowan v. Maryland (1961) 366 U.S. 420, 425-426 [6 L.Ed.2d 393, 398-399, 81 S.Ct. 1101].) [Par.] On the other hand, in cases involving 'suspect classifications' or touching on 'fundamental interests,' [fn. omitted] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. (See Shapiro v. Thompson, *supra*, 394 U.S. 618, 638 [22 L.Ed.2d 600, 617]; Sherbert v. Verner (1963) 374 U.S. 398, 406 [10 L.Ed.2d 965, 971-972, 83 S.Ct. 1790]; Skinner v. Oklahoma, *supra*, 316 U.S. 535, 541 [86 L.Ed. 1655, 1660]; see also Developments in the Law—Equal Protection (1969) 82 Harv.L.Rev. 1064, 1120-1131.) Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (See Castro v. State of California (1970) 2 Cal.3d 223, 234-236.)

More recently in Williams v. Illinois, *supra*, ___ U.S. ___, 38 U.S.L. Week 4607, the Supreme Court dealt with the equal protection clause in a factual setting very similar to

the one now before us. There the defendant, an indigent, was convicted of petty theft and was given the maximum sentence provided by law—one year imprisonment and a $500 fine; he was also taxed $5 in court costs. As permitted by the Illinois statute, the judgment directed that in the event of nonpayment of the fine and costs, the defendant was to remain in jail to "work off" such obligations at the rate of $5 per day. The effect of this was to extend his incarceration for 101 days beyond the maximum period of confinement.

Vacating the judgment and remanding the case for further proceedings, the court said: "Applying the teaching of the *Griffin* case here, we conclude that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense. [Par.] . . . Here the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. [Fn. omitted.] Since only a convicted person with access to funds can avoid the increased imprisonment the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment. [Fn. omitted.]"[8] (Wil-

[8]The *Williams* court appears to have assumed that the state's interest in the collection of revenues produced by payment of fines is "substantial and legitimate." (38 U.S.L. Week 4607). By extending the rationale of *Griffin* to a de facto discrimination not affecting the

liams v. Illinois, *supra*, ___ U.S. ___, 38 U.S.L. Week 4608-4609.)

We are satisfied that in the case at bench, as in *Williams*,[9] we are presented with an example of discrimination between different groups or classifications of convicted criminal defendants—those who are poor and those who are not—or, to put it another way, of discrimination based upon poverty. We have no doubt therefore that the instant case involves "suspect classifications" which must be reviewed and evaluated under the stricter standards mentioned above. We therefore reject respondent's contention that the statutes in question as here applied are "without constitutional infirmity" in the light of the equal protection clause. Our inquiry then is whether imprisonment of an indigent convicted defendant for nonpayment of a fine is "necessary to promote a *compelling* governmental interest, . . ." (Shapiro v. Thompson, *supra*, 394 U.S. 618, 634.)

As we have already pointed out, respondent contends that petitioner's imprisonment can be justified because (a) it "acts as a method" of enforcing payment of the fine and (b) it "relates to" his reformation and rehabilitation. Some-

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integrity of trial or appellate processes (cf. Rinaldi v. Yeager, *supra*, 384 U.S. 305, 307-308), the court also appears to have concluded that the discrimination inherent in the type of sentence invoked in *Williams* is not necessary to promote such "substantial and legitimate" interest. By pointing to the existence of alternative, less intrusive methods of promoting this interest, the count in effect demonstrated the lack of necessity. (38 U.S.L. Week at p. 4609.)

[9] *Williams* involved slightly different facts. There the trial court imposed the maximum sentence: one year imprisonment and a $500 fine. Of necessity, inability to pay the fine portion of the sentence resulted in longer imprisonment than could be imposed in the case of a defendant with means. (Cf. People v. Saffore (1966) 18 N.Y.2d 101 [218 N.E.2d 686, 271 N.Y.S.2d 972].) Imprisonment for nonpayment of the fine in the instant case does not, of course, result in a total term of imprisonment in excess of the statutory maximum. (Pen. Code, § 448a.)

what in the manner of the court in *Williams*, we assume that the state's interest in the collection of fines and in the reformation and rehabilitation of convicted defendants is "substantial and legitimate." (Williams v. Illinois, *supra*, ___ U.S. ___, 38 U.S.L. Week 4607.) The crucial question before us is whether the practice of imprisoning indigent convicted defendants for nonpayment of fines is necessary to promote either of these interests.

A number of cases have considered the constitutional validity of the practice in question.[10] Virtually none of

[10]Prior to 1960 none of the cases appear to have involved challenges based upon a defendant's indigency. See, e.g., Hill v. Wampler (1936) 298 U.S. 460; Ex parte Jackson (1877) 96 U.S. 727; Ex parte Garrison (1924) 193 Cal. 37, 38; In re Claudette (1937) 21 Cal. App. 2d 688; In re Sullivan (1906) 3 Cal. App. 193, 194-195; People ex rel. Gately v. Sage (1897) 13 App. Div. 135 [43 N.Y.S. 372, 373-374]; but cf. Foertsch v. Jameson (1925) 48 S.D. 328 [204 N.W. 175, 176]. The question whether the imprisonment of indigent convicted defendants for nonpayment of fines offended the equal protection clause under the principle declared in *Griffin* was raised in Wildeblood v. United States, *supra*, 109 U.S. App. D.C. 163, 284 F.2d 592 (dissent by Edgerton, J.). During the last ten years numerous cases dealt with the question. See, for example, United States ex rel. Privitera v. Kross (S.D.N.Y. 1965) 239 F.Supp. 118, affd., (2d Cir. 1965) 345 F.2d 533, cert. denied, 382 U.S. 911 (1965); Kelly v. Schoonfield (D. Md. 1968) 285 F.Supp. 732; Morris v. Schoonfield (D. Md. 1969) 301 F.Supp. 158, vacated, ____ U.S. ___, 38 U.S.L. Week 4690; Sawyer v. District of Columbia (D.C. Ct. App. 1968) 238 A.2d 314; People v. Williams (1969) 41 Ill.2d 511 [244 N.E. 2d 197] revd. *sub nom.* Williams v. Illinois, *supra*, ___ U.S. ___, 38 U.S.L. Week 4607; People ex rel. Jackson v. Ruddell (1969) 42 Ill.2d 40 [245 N.E.2d 761]; State v. Hampton (Miss. 1968) 209 So.2d 899; Wade v. Carsely (Miss. 1969) 221 So.2d 725; State v. Lavelle (1969) 54 N.J. 315 [255 A.2d 223]; State v. Allen (1969) 104 N.J. Super. 187 [249 A.2d 70], affd., 54 N.J. 311 [255 A.2d 221]; People v. Saffore, *supra*, 18 N.Y.2d 101 [218 N.E.2d 686, 271 N.Y.S.2d 972]; People v. Mackay (1966) 18 N.Y.2d 755 [221 N.E.2d 462, 274 N.Y.S.2d 682]; People v. Tennyson (1967) 19 N.Y.2d 573 [227 N.E.2d 876, 281 N.Y.S.2d 76]; People v. Collins (1965) 47 Misc.2d 210 [261 N.Y.S.2d 970]; People ex rel. Loos v. Redman (1965) 48 Misc.2d 592 [265 N.Y.S. 2d 453]; People v. McMillan (1967) 53 Misc.2d 685 [279 N.Y.S.2d 941]; Nemeth v. Thomas (N.Y. Sup. Ct., Dec. 5, 1966) 35 U.S.L.

these decisions, however, have analyzed the problem in terms of the relationship between imprisonment of indigents and the state interests sought to be promoted thereby.[11] Accordingly, it would serve no worthwhile purpose to review the varying results reached in these decisions or the conflicting rationales employed.[12]

We first consider whether the practice is necessary to promote the state's interest in collection of fines. There are two reasons why it is not.

In the first place, it is not clear that imprisonment can serve the end of enforcing collection of the fine at all in the instant case. We have no doubt that this practice may properly be used to compel payment of fines in proper cases. (Ex parte Garrison, *supra*, 193 Cal. 37, 38 and cases there cited; In re Fil Ki (1889) 80 Cal. 201, 203; Ex parte Kelly (1865) 28 Cal. 414, 415. Proper use of imprisonment as a coercive mechanism presupposes an ability to pay and a contumacious offender. In the instant case we deal with the application of the practice to *indigents*. (See fn. 6, *ante*.) As applied to indigents we fail to see how either the threat or the actuality of imprisonment can force a man

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Week 2320; Strattman v. Studt, *supra*, 20 Ohio St. 2d 95 [253 N.E. 2d 749]; Petition of Cole (1968) 17 Ohio App.2d 207 [245 N.E.2d 384]; Ex parte Tate (Tex. Ct. Crim. App. 1969) 445 S.W.2d 210, cert. granted June 29, 1970, *sub nom.* Tate v. Short, ___ U.S. ___, 38 U.S.L. Week 3522, 39 U.S.L. Week 3001. See generally Annot., 31 A.L.R.3d 926.

[11] The opinion in Strattman v. Studt, *supra*, 20 Ohio St.2d 95 [253 N.E.2d 749] constitutes one of the few examples of such analysis coming to our attention.

[12] The decisions upholding the validity of the practice have often been accompanied by vigorous dissents. See e.g., State v. Allen *supra*, 104 N.J. Super. 187 [249 A.2d 70, 75] (Conford, J., dissenting); State v. Lavelle, *supra*, 54 N.J. 315, 328 [255 A.2d 223, 230] (Proctor, J. dissenting, concurred in by Jacobs and Schettino, JJ.); Morris v. Schoonfield, *supra*, 301 F.Supp. 158, 165 (Winter, J. concurring in part and dissenting in part).

who is without funds, to pay a fine. (Accord: Morris v. Schoonfield, *supra*, 301 F.Supp. 158, 163, vacated on other grounds, ___ U.S. ___, 38 U.S.L. Week 4690 (1970); Note, 4 Houston L.Rev. (1967) 695, 701.)

In the second place, even if it is assumed that imprisonment of indigents serves the state's purpose of enforcing collection of fines, it is clear that this particular mechanism for promoting that state interest is not "necessary" in the constitutional sense. In *Williams* the court held that the particular type of "work-out" sentence there involved was not necessary to promote the state's legitimate interest because there existed alternative and less-intrusive means whereby the state could further its interest. There Chief Justice Burger said: "The State is not powerless to enforce judgments against those financially unable to pay a fine; . . . [Par.] [there are] numerous alternatives to which the State by legislative enactment—or judges within the scope of their authority—may resort in order to avoid imprisoning an indigent beyond the statutory maximum for involuntary nonpayment of a fine . . ." (38 U.S.L. Week at p. 4609.) The alternative procedures for collecting fines of which the court spoke in *Williams* are no less efficacious in the instant case than they were there.[13] Because the state has available to it these alternative method of collecting fines, we cannot conclude that imprisonment of indigents is necessary to promote this state interest.

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[13]The court in *Williams* listed several alternatives to imprisonment for nonpayment of fines. (See Williams v. Illinois, *supra*, ___ U.S. ___, 38 U.S.L. Week at p. 4609, fn. 21.) A number of authorities in addition to these have also proposed means by which the state may promote its interests. (See Task Force on Administration of Justice, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967) at p. 18; Note, *Fines, Imprisonment and the Poor, supra*, 57 Cal. L. Rev. 778, 810-819; Comment, *Equal Protection and the Use of Fines as Penalties for Criminal Offenses* (1966) 1966 Ill.L. Forum 460, 463-466; Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines* (1966) 64 Mich. L. Rev. 938, 945-947.)

We turn to consider respondent's contention that imprisonment is permissible because it serves the state's interest in the rehabilitation and reformation of indigent offenders. We find it also untenable. Respondent's position is that petitioner's imprisonment is valid because "the condition of a fine or a reparation, even though petitioner is unable to pay, impresses upon him his responsibility to the county for his criminal behavior. Awareness of the financial price of his conduct, a mere token of the total cost of the criminal prosecution, may encourage him to be a law-abiding citizen, to meet his responsibilities and to satisfy his obligations."

Although respondent does not explain how the imposition of a fine impresses such values upon an indigent, obviously his position must be that imprisonment for the indigent's involuntary failure to pay the fine is a related and equally effective means of doing so. It does not follow, however, that the mere equating of the imprisonment of the indigent who cannot pay a fine with the cash payment of the nonindigent who can, to the end of promoting the rehabilitation of both classes of offenders, compels the conclusion that the treatment of the former is constitutionally permissible. What we have said above establishes that there are alternative methods by which the state may enforce collection of fines. These same methods simultaneously promote the state's interest in rehabilitating the offender and by requiring compliance on the part of an indigent offender with onerous conditions, they serve to make him aware of his responsibility for his criminal conduct and to encourage him to become a law-abiding citizen.

In sum, the state can impress upon indigents their "responsibility to the county for [their] criminal behavior" through available alternate procedures. Since the state may thus promote its interest in rehabilitation directly, imprisonment of the indigent offender for nonpayment of his fine should not be necessary.

In the case before us, the record shows beyond any contradiction that although imposition of sentence was suspended and petitioner was granted probation, he was unable to pay the fine and penalty assessment fixed by the court as a condition of probation, *solely* because he was an indigent. Under the court's order, he incurred imprisonment, not because he refused to comply with these conditions of his probation, but simply because he was unable to do so. Although the court had apparently determined that a proper punishment for his offense did not require incarceration, he was unable to obtain his freedom only because he was poor.

We therefore conclude that petitioner's imprisonment because of his inability, due solely to his indigency, to pay the fine and penalty assessment imposed upon him as a condition of probation was not necessary to promote the state interests claimed by respondent and constituted an invidious discrimination based on his poverty in violation of the equal protection clause of the Fourteenth Amendment. We further conclude that Penal Code sections 1205 and 13521 as applied to petitioner are unconstitutional. As a result execution of the provisions of the probation order here under attack cannot be upheld on the independent bases urged by respondent that said provisions constitute a reasonable condition relating to petitioner's reformation and rehabilitation. Their inherent constitutional defect is fatal to their serving this function.

We deem it desirable to make the following observations. First, there is no significant difference in the fact that petitioner's fine and penalty assessment were imposed as a condition of probation in the court's probation order rather than in a judgment of conviction after denial of probation. We are of the view that the same constitutional principles govern both situations.

Second, we do not hold that the imposition upon an indigent offender of a fine and penalty assessment, either as a sentence or as a condition of probation, constitutes of

necessity in all instances a violation of the equal protection clause. Depending upon the circumstances of the particular case and the condition of the individual offender, there are a variety of ways in which the state may fine the indigent offender, as alternatives to imprisonment, without offending the command of equal protection (see fn. 13, *ante*). What we say is that Penal Code sections 1205 and 1203.1 may not be applied in such a way as to foreclose to the indigent offender the opportunity to obtain his freedom which is implicit in a sentence or probation order providing for payment of a fine. Rather, our holding is simply that an indigent who would pay his fine if he could, must be given an option comparable to an offender who is not indigent. When the indigent offender refuses to avail himself of such alternatives at the inception, or defaults or otherwise fails to meet the conditions of the particular alternative which is offered him without a showing of reasonable excuse, the indigent offender becomes in the eyes of the court exactly the same as the contumacious offender who is not indigent. When either of these conditions obtain the offender's *indigency* ceases to be dispositive and he may, consistently with the mandate of the equal protection clause, be relegated to "working out" his fine by imprisonment.

Finally, we point out that nothing in today's opinion diminishes the wide scope of authority vested in the sentencing judge in the exercise of his powers. (See Williams v. Illinois, *supra*, ___ U.S. ___, 38 U.S.L. Week at p. 4609.) Our holding requires only that an indigent be released when the sentencing judge has found his imprisonment to be unnecessary to serve any public interest (see State v. Lavelle, *supra*, 54 N.J. 315, 320 [255 A.2d 223, 226]); we assume that a fine is not imposed on a particular indigent offender with the objective of bringing about his eventual imprisonment for its nonpayment for "to do so would be to accomplish indirectly as to an indigent that which cannot be done directly." (Williams v. Illinois, *supra*, ___ U.S. ___, 38 U.S.L. Week at p. 4609. See Henderson v. United

States (D.C.C.A. 1963) 189 A.2d 132, 133.) The sentencing judge's bona fide discretion to impose imprisonment directly in cases where he deems it appropriate is unaffected by today's decision.

In view of the conclusions which we have reached, it is unnecessary to discuss petitioner's remaining contentions.

We have decided that the petition for the writ of habeas corpus should be granted only to discharge petitioner from the illegal restraint depicted above, namely his imprisonment resulting from his inability, due to his indigency, to pay the fine and penalty assessment imposed as a condition of probation but not to discharge or relieve him from any other restraint or obligation to which he may be subject by virtue of the Order for Probation entered by the superior court on April 15, 1969. Since petitioner has been impermissibly confined in jail pursuant to the order that court is directed to allow him for the period of his confinement a credit against the amount of his fine and penalty assessment calculated at the rate specified in said Order for Probation and an adequate opportunity, consonant with the views herein expressed, to pay the balance.[14] Since that portion of paragraph 7 of the Order for Probation providing for confinement in jail in lieu of payment of the monetary obligations therein specified may be constitutionally carried out in some circumstances, we do not order it stricken, but we direct that execution of the order by the superior court be in accordance with the views herein expressed. Except as hereinabove stated the Order for Probation is not vacated modified or affected by this opinion.

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[14]The record shows that petitioner was confined in the county jail between the dates of April 15 and October 17, 1969, or a total of 186 days. The condition set for probation was the payment for a fine of $2,500 and a 25 percent penalty assessment, or the sum of $3,125. At the rate specified in the probation order defendant has satisfied $1,860 of this sum. There is now outstanding a debt in the amount of the difference, $1,265, owing from petitioner to the County of Santa Clara.

The writ is granted. Petitioner is discharged from the custody of the sheriff of Santa Clara County.

SULLIVAN, J., Acting C.J.

WE CONCUR:

PETERS, J.
TOBRINER, J.
MOSK, J.
BURKE, J.
MOLINARI, J. Pro Tem.*

I dissent. I would deny the writ.

McCOMB, J.

*Assigned by the Chairman of the Judicial Council.

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Memorandum for respondent
files on Jan. 22, 1971
(Letter)
(Not printed)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TATE *v.* SHORT

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 324. Argued January 14, 1971—Decided March 2, 1971

Petitioner, an indigent, was convicted of traffic offenses and fined a total of $425. Though Texas law provides only for fines for such offenses, it requires that persons unable to pay must be incarcerated for sufficient time to satisfy their fines, at the rate of $5 per day, which in petitioner's case meant an 85-day term. The state courts denied his petition for habeas corpus. *Held:* It is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it. *Williams* v. *Illinois*, 399 U. S. 235. Pp. 2–6.

445 S. W. 2d 210, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACKMUN, J., filed a statement concurring in the opinion and judgment. BLACK, J., concurred in the result. HARLAN, J., filed a statement concurring in the result.

SUPREME COURT OF THE UNITED STATES

No. 324.—October Term, 1970

Preston A. Tate, Petitioner, v. Herman Short, Chief of Police, Houston, Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[March 2, 1971]

Mr. Justice Brennan delivered the opinion of the Court.

Petitioner accumulated fines of $425 on nine convictions in the Corporation Court of Houston, Texas, for traffic offenses. He was unable to pay the fines because of indigency [1] and the Corporation Court, which otherwise has no jurisdiction to impose prison sentences,[2] committed him to the municipal prison farm according to the provisions of a state statute and municipal

[1] At the habeas hearing the assistant district attorney appearing for the State stipulated: "We would stipulate he is poverty stricken, and that his whole family has been for all periods of time therein, and probably always will be." Petitioner's uncontradicted testimony at the hearing was that, prior to his imprisonment, he earned between $25 and $60 a week in casual employment. He also received a monthly Veterans' Administration check of $104.00. He has a wife and two children dependent on him for support. We were advised on oral argument that under Texas law his automobile was not subject to execution to collect the fines.

[2] Tex. Code Crim. Proc. Ann. art. 4.14 (1966) provides:

"The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, and arising within such corporate limits."

ordinance [3] which required that he remain there a sufficient time to satisfy the fines at the rate of five dollars for each day; this required that he serve 85 days at the prison farm. After 21 days in custody, petitioner was released on bond when he applied to the County Criminal Court of Harris County for a writ of habeas corpus. He alleged that "Because I am too poor, I am, therefore, unable to pay the accumulated fine of $425." The county court held that "legal cause has been shown for the imprisonment," and denied the application. The Court of Criminal Appeals of Texas affirmed, stating "We overrule appellant's contention that because he is too poor to pay the fines his imprisonment is unconstitutional." 445 S. W. 2d 210 (1969). We granted certiorari, 399 U. S. 925 (1970). We reverse on the authority of our decision in *Williams* v. *Illinois*, 399 U. S. 235 (1970).

The Illinois statute involved in *Williams* authorized both a fine and imprisonment. Williams was given the maximum sentence for petty theft of one year's imprisonment and a $500 fine, plus $5 in court costs. The judgment, as permitted by the Illinois statute, provided that if, when the one-year sentence expired, Williams did not pay the fine and court costs, he was to remain

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[3] Tex. Code Crim. Proc. Ann. art. 45.53 (1966) provides in pertinent part:

"A defendant placed in jail on account of failure to pay the fine and costs can be discharged on habeas corpus by showing:

"1. That he is too poor to pay the fine and costs; and

"2. That he has remained in jail a sufficient length of time to satisfy the fine and costs, at the rate of $5 for each day."

Houston Code, § 35–8, provides:

"Each person committed to the county jail or to the municipal prison farm for non-payment of their fine arising out of his conviction of a misdemeanor in the corporation court shall receive a credit against such fine of five dollars ($5.00) for each day or fraction of a day that he has served."

in jail a sufficient length of time to satisfy the total amount at the rate of $5 per day. We held that the Illinois statute as applied to Williams worked an invidious discrimination solely because he was too poor to pay the fine, and therefore violated the Equal Protection Clause.

Although the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency.[4] In *Morris* v. *Schoonfield*, 399 U. S. 508, 509 (1970), four members of the Court anticipated the problem of this case and stated the view, which we now adopt, that

> ". . . the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the

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[4] Houston Code, § 39–9, provides:

". . . additional credit against the fine of each prisoner may be granted by the superintendent of the municipal prison farm for good conduct, industry and obedience; provided, however, that such additional credit shall not exceed in time more than one-half (½) day credit on his fine for each day's work."

An implementing regulation of the Fines Bureau Division of the Houston Corporation Court interprets this provision as follows:

"If a person appears in court and is found guilty and does not have money to pay his fine, he is committed to jail to serve the amount of the fine at the rate of $5.00 per day. In certain cases a person may be allowed $7.50 credit per day."

It does not appear that petitioner was granted the increased credit for any of the 21 days he served before his release.

> State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."

Our opinion in *Williams* stated the premise of this conclusion in saying that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." 399 U. S., at 244. Since Texas has legislated a "fines only" policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant can't pay because he is indigent and his imprisonment, rather than aid collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.

There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines. We repeat our observation in *Williams* in that regard, 399 U. S., at 244–245 (footnotes omitted):

> "The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.

"It is unnecessary for us to canvass the numerous alternatives to which the State by legislative enactment—or judges within the scope of their authority—may resort in order to avoid imprisoning an indigent beyond the statutory maximum for involuntary nonpayment of a fine or court costs. Appellant has suggested several plans, some of which are already utilized in some States, while others resemble those proposed by various studies. The State is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones." [5]

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[5] Several States have a procedure for paying fines in installments. *E. g.*, Cal. Penal Code § 1205 (West 1970) (misdemeanors); Del. Code Ann. tit. 11, § 4332 (c) (Supp. 1968); Md. Ann. Code art. 38, § 4 (a)(2) (Supp. 1970); Mass. Gen. Laws Ann. ch. 279, § 1A (1959); N. Y. Code Crim. Proc. § 470-d (1)(b) (McKinney Supp. 1970); Pa. Stat. Ann. tit. 19, § 953 (1964); Wash. Rev. Code Ann. § 9.92.070 (1961).

This procedure has been widely endorsed as effective not only to collect the fine but also to save the expense of maintaining a prisoner and avoid the necessity of supporting his family under the state welfare program while he is confined. See, *e. g.*, National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code § 3302 (4) (1970); ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 2.7 (b), pp. 119–122 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 18 (1967); A. L. I., Model Penal Code § 302.1 (1) (Proposed Official Draft 1962). See also Comment, Equal Protection and the Use of Fines as Penalties for Criminal Offenses, 1966 U. Ill. L. Forum 460; Note, The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines, 64 Mich. L. Rev. 938 (1966); Note, Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution, 22 Vand. L. Rev. 611 (1969); Note, Fines and Fining—An Evaluation, 101 U. Pa. L. Rev. 1013 (1953). Sellin, Recent Penal Legislation in Sweden 14 (1947); Cordes, Fines and Their Enforcement, 2 J. Crim. Sci. 46 (Radzinowicz & Turner ed. 1950); S. Rubin,

We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.

The judgment of the Court of Criminal Appeals of Texas is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE HARLAN concurs in the judgment of the Court on the basis of the considerations set forth in his opinion concurring in the judgment in *Williams* v. *Illinois*, 399 U. S. 235, 259 (1970).

H. Weihofen, G. Edwards & S. Rosenzweig, The Law of Criminal Correction 253 and n. 154 (1963); E. Sutherland & D. Cressey, Principles of Criminology 276 (6th ed. 1960). See also *Williams* v. *Illinois*, 399 U. S., at 244–245 n. 21.

SUPREME COURT OF THE UNITED STATES

No. 324.—October Term, 1970

Preston A. Tate, Petitioner, *v.* Herman Short, Chief of Police, Houston, Texas.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[March 2, 1971]

Mr. Justice Blackmun, concurring in the opinion and judgment of the Court.

The Court's opinion is couched in terms of being constitutionally protective of the indigent defendant. I merely add the observation that the reversal of this Texas judgment may well encourage state and municipal legislatures to do away with the fine and to have the jail term as the only punishment for a broad range of traffic offenses. Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions and leaves only possible Eighth Amendment considerations. If, as a nation, we ever reach that happy point where we are willing to set our personal convenience to one side and we are really serious about resolving the problems of traffic irresponsibility and the frightful carnage it spews upon our highways, a development of that kind may not be at all undesirable.